TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 731.

MARCUS BROWN HOLDING COMPANY, INC., APPELLANT,

vs.

MARCUS FELDMAN, BENJAMIN SCHWARTZ, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 9, 1921.

(28,088)

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Notice of Appeal.

1

DISTRICT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF NEW YORK.

MARCUS BROWN HOLDING COMPANY,
Complainant.

—against—

MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,

Defendants

2

Sirs:

PLEASE TAKE NOTICE that the Marcus Brown Holding Company, feeling itself aggrieved by the order and decree made and entered herein dated the 23rd day of December, 1920, hereby appeals to the Supreme Court of the United States to be holden at the Capitol, in the City of Washington, in the District of Columbia, from the said order dismissing the Bill of Complaint herein and denying to the complainant the relief prayed for in said bill and from each and every part of said order.

3

New York City, N. Y., December 23rd, 1920.

Yours, &c.,

JOSEPH A. SEIDMAN,
Solicitor for Complainant,
Office & P. O. Address,
No. 63 Park Row,
Borough of Manhattan,
City of New York.

Notice of Appeal.

4 To:

The ATTORNEY GENERAL of the STATE OF NEW YORK,

EDWARD SWANN, defendant, DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, STATE OF NEW YORK,

SAMUEL R. GERSTEIN, Attorney for Defendants, Marcus Feldman, Benjamin Schwartz, F. Schwartz,

5 MARCUS FELDMAN, BENJAMIN SCHWARTZ, FRANK SCHWARTZ,

Endorsed: Filed Dec. 23rd, 1920.

6

Citation.

By the Honorable Charles M. Hough, one of the Judges of the Circuit Court of the United States for the Southern District of New York.

THE PRESIDENT OF THE UNITED STATES OF AMERICA To:—

Marcus Feldman, Benjamin Schwartz, Frank Schwartz, and Edward Swann, as District Attorney of the County of New York in the State of New York,

Defendants.

GREETING:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the Capitol, in the City of Washington, in the District of Columbia, on the 22nd day of January, 1921, pursuant to an order allowing an appeal duly entered and filed in the Office of the Clerk of the District Court of the United States for the Southern District of New York, wherein the Marcus Brown Holding Company, Inc. is appellant and you are defendant-appellees and respondents, to show cause, if any there be, why the decree rendered against the said appellant and in said order allowing appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles M. Hough, United States Circuit Judge, at the Borough of Manhattan, in the City of New York, Southern

10 District of New York, the 24th day of December, in the year of our Lord One thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-fifth.

C. M. Hough,
U. S. Circuit Judge for the 2nd Circuit.

Affidavit of service of copy of citation on Samuel R. Gerstein, Attorney for defendant, on Dec. 24th, 1920.

11 Admission of service of copy of citation from District Attorney on December 24th, 1920.

Admission of service of copy of citation from Attorney General on December 24th, 1920.

Endorsed: Filed: December 24th, 1920.

12

Petition.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

MARCUS BROWN HOLDING COMPANY,
Complainant,

—against—

MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,
Defendants.

To the Honorable Charles M. Hough, United States Circuit Judge, and the Honorable Julius M. Mayer and the Honorable Augustus N. Hand, District Judges of the United States for the Southern District of New York:

The petition of Marcus Brown Holding Company respectfully shows:

That it considers itself aggrieved by the order made and entered in the United States District Court for the Southern District of New York on the 23rd day of December, 1920, in the office of the Clerk of this Court, dismissing the Bill of Complaint herein and denying to it the relief prayed for in said bill, and does hereby petition for an appeal from said order and decree to the

16 Supreme Court of the United States, and prays that an appeal may be allowed and citation granted and directed to the defendants herein and all other parties in interest, commanding them and each of them to appear before the Supreme Court of the United States.

Dated, New York City, December 23rd, 1920.

MARCUS BROWN HOLDING COMPANY,
Petitioner.

17 JOSEPH A. SEIDMAN,
Solicitor for Complainant,
Office and P. O. Address,
No. 63 Park Row,
Manhattan,
City of New York.

The foregoing appeal and petition therefor is hereby allowed.

Dated, New York City, N. Y., December 23rd, 1920.

C. M. HOUGH,
U. S. C. J.

18

Endorsed: Filed December 23rd, 1920.

Notice of Presentation of Petition to Appeal.

DISTRICT COURT OF THE UNITED STATES, 19

SOUTHERN DISTRICT OF NEW YORK.

MARCUS BROWN HOLDING COMPANY,
Complainant,

—against—

MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,

Defendants. 20

PLEASE TAKE NOTICE that the annexed petition for allowance of appeal will be presented to the Honorable Charles M. Hough, Circuit Judge of the United States District Court, Southern District of New York, and the Honorable Julius M. Mayer and the Honorable Augustus N. Hand, District Judges of the United States for the Southern District of New York, at their chambers on the 23rd day of December, 1920, at 2 o'clock P. M.

Dated, December 22nd, 1920. 21

Yours, etc.,

JOSEPH A. SEIDMAN,
Solicitor for Complainant,
Office and Post Office Address,
63 Park Row,
Borough of Manhattan,
City of New York.

To:

THE ATTORNEY GENERAL
OF THE STATE OF NEW YORK;

Order Dismissing Bill of Complaint, Appealed From.

22

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

MARCUS BROWN HOLDING COMPANY,
Complainant,

—against—

MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,

Defendants.

23

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

That the Bill of Complaint herein be, and the same hereby is, dismissed, but without costs and without prejudice.

Dated, New York City, N. Y., December 23rd, 1920.

C. M. HOUGH, C. J.,
JULIUS M. MAYER,
24 AUGUSTUS N. HAND, D. J.

Notice of entry of the foregoing decree is hereby waived.

ROBERT S. JOHNSTONE,
Solicitor for Defendants,
Edward Swann as Dist. Atty.

SAMUEL GERSTEIN &
DAVID L. PODELL,
Solicitors for Defendants,
Feldman, Schwartz & Schwartz.

Endorsed: Filed Dec. 23rd, 1920.

Bill in Equity and Order to Show Cause.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MARCUS BROWN HOLDING COMPANY,
Complainant,

—against—

MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,
Defendants.

Upon the bill of complaint and the affidavit of Joseph A. Seidman hereto annexed, duly verified the 17th day of November, 1920, LET the defendants and each of them appear at a stated term of this Court to be composed of judges in accordance with Section 266, Judicial Code Amended (Section 1243 of the United States Compiled Statutes, 1918), to be held at the United States Court House and Post Office Building on the 26th day of November, 1920, at 10:30 o'clock A. M., on that day or as soon thereafter as counsel can be heard, and show cause why an order should not be made herein enjoining and restraining the defendant Edward Swann, as District Attorney of the County of New York, from instituting proceedings or actions of any kind for

any act done or committed or omitted by the complainant, its officers and agents, for its or their failure or refusal to furnish steam heat, hot and cold water, elevator service, or any other service or thing to the defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz, or any other person occupying any part of the building, the property of the complainant, without its consent or permission and holding over against its will after October 1st, 1920, under color of the statutes and laws enacted by the said Legislature during the year 1920; also enjoining and restraining the defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz from entering upon or continuing to occupy the apartment herein described or to make use of any of the property belonging to this complainant without the complainant's consent, and why the complainant should not have such other and further relief as to the Court may seem just and equitable.

Service of a copy of this order upon the defendants on or before the 20th day of November, 1920, shall be deemed sufficient.

Dated, November 18th, 1920.

JULIUS M. MAYER,
U. S. District Judge.

Affidavit of Joseph A. Seidman.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

MARCUS BROWN HOLDING COMPANY,
Complainant,

—against—

MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,
Defendants.

United States of America,
State of New York,
County of New York—ss:

JOSEPH A. SEIDMAN, being duly sworn, deposes and says:

I am the solicitor and attorney for the complainant herein and was also the attorney for the Marcus Brown Construction Company, Inc.

On or about the 26th day of February, 1920, a lease in writing was made and entered into by and between the Marcus Brown Construction Company, Inc., complainant's predecessor in title, and one Benjamin Goldsmith for the apartment mentioned and described in the Bill of Complaint herein and occupied by the defendants

Marcus Feldman, Benjamin Schwartz and Frank Schwartz. By the terms of the said lease the said Benjamin Goldsmith was to use and occupy the said premises on and after October 1, 1920, for a term of five years at the annual rental of Three thousand eight hundred ($3,800) Dollars, and by the terms of the said agreement the said Marcus Brown Construction Company, Inc., undertook to place the said Benjamin Goldsmith in possession of the said premises on the 1st day of October, 1920.

That as appears from the correspondence hereto annexed and hereby referred to and made a part of this affidavit, as early as March 11, 1920, the defendants Feldman and Schwartz were notified of the execution and delivery of the said lease to said Benjamin Goldsmith and on or about the 4th day of June, 1920, the said defendants for the first time, through Samuel R. Gerstein, their attorney, notified the said Marcus Brown Construction Company, Inc., that they were willing to renew their lease of the apartment at a reasonable increase, to be determined by the Mayor's Committee, and that if satisfactory arrangements could not be made between the said defendants and the said Marcus Brown Construction Company, Inc., that it was the purpose of the said defendants to apply to the Court for a sufficiently long stay of the warrant in any hold-over proceeding which might be brought by the Marcus Brown Construction Company, Inc., on or after October 1st, 1920. To this letter, annexed hereto and marked "Exhibit A," deponent replied by letter dated June 8, 1920, annexed

hereto and marked "Exhibit B." Thereafter de- 37
ponent, by another letter dated June 17, 1920, annexed hereto and marked "Exhibit C," notified the said Samuel R. Gerstein, Esq., attorney for the said defendants, that his clients could without much effort obtain possession of various apartments in the said letter enumerated. On June 18, 1920, the said Samuel R. Gerstein advised deponent that he would investigate the matter referred to (annexed hereto and marked "Exhibit D"). On July 14, 1920, deponent received another letter from the said Samuel R. Gerstein, Esq., which letter has been mislaid, and to 38
this letter deponent replied by letter dated July 19, 1920, a copy of which is hereto annexed and marked "Exhibit E." On July 20, 1920, deponent again wrote to the said Samuel R. Gerstein by letter, a copy of which is hereto annexed and marked "Exhibit F," informing him that his clients could obtain the use of an apartment in the premises adjoining those owned by the Marcus Brown Construction Company, Inc.

Annexed hereto is a memorandum given by L. J. Phillips & Co. on June 15th, 1920, showing that they offered to let on that day various apartments at 219 West 81st Street, 2178 Broad- 39
way, and 2131 Broadway; also a memorandum of Pease & Elliman issued the same day, showing that on or about the said 15th day of June, 1920, they were prepared to let various apartments at 2131 Broadway, 2178 Broadway, 391 West End Avenue, and 440 West End Avenue; also a memorandum signed by the superintendent for the Nassoit and Laning offering to let a

40 seven-room apartment at No. 545 West 111th Street on or about the said 15th day of June, 1920. Deponent is also advised and verily believes that in the premises on the southeast corner of 92nd Street and West End Avenue there was a vacant apartment which was offered to let, and that similar apartments were to let in a building directly opposite the premises owned by the complainant, which is still vacant or to let.

Deponent is advised and verily believes that the said defendants made no effort to hire any
41 of the apartments above mentioned or any other apartment and relied upon the power of the Mayor's Committee to compel the owner to accept such rent as it might determine to be reasonable, and upon the statutes enacted by the Legislature of the State of New York in April and September of 1920.

By reason of the facts and circumstances herein set forth it is of the utmost importance and of public concern that this present application be speedily determined in order that the rights and interests of the parties may be adjusted accordingly.

42 No previous application has been made for this Rule to Show Cause in this suit.

WHEREFORE, a Rule to Show Cause is prayed for, returnable within five days.

J. A. SEIDMAN.

Sworn to before me this
17th day of November, 1920.

JACOB S. LIST,
Commissioner of Deeds,
City of New York.

Memoranda.

43

545 W. 111th 7 R. $2600.

See Supt.
H. T. Hyland
for Nassoit & Laning.

4D-7
4C-6

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7 Rooms 2131 Bway (74-75) Rent $2800-3200.
7 Rooms 2178 Bway (Cor. 77th) Rent 3500.
7 Rooms 391 West End Ave. (78-79) Rent $3200.
7 Rooms 440 West End Ave (81st St.) Rent $3000.

44

Respectfully submitted,

PEASE & ELLIMAN,

Per OHE.

---

7 Rms 219 West 81st St. Rental $3500. See Supt.
7 Rms 2178 Broadway Rental 3500.
8 Rms 2131 Broadway Rental 3600.
7 Rms 2131 Broadway Rental 3000.

45

Miss Liebeskind,

L. J. PHILLIPS & CO.

Exhibit "A."

46

June 4, 1920.

Marcus Brown Construction Co., Inc.,
91st Street and Broadway,
New York City.

Gentlemen:

On behalf of my clients Marcus Feldman and Schwartz Bros. I desire to state that they are willing to renew their lease of apartment 92 in your premises at a reasonable increase to
47 be determined by the Mayor's Committee.

My clients have made repeated attempts to find similar rooms in the neighborhood, but have been unsuccessful. If a satisfactory arrangement cannot be made between you my clients intend to apply to the court for a sufficiently long stay of the warrant in any holdover proceeding that might be brought by you on or after October 1st.

Awaiting word from you and trusting that this matter may be amicably adjusted,

I beg to remain,

48

Yours truly,

SAMUEL R. GERSTEIN.

SRG:HMM.

Exhibit "B."

June 8, 1920.

Samuel R. Gerstein, Esq.,
299 Broadway,
New York City.

Dear Sir:

After due notice to your client the Marcus Brown Construction Company on February 26th last and before the enactment of the Rent Laws, leased to Benjamin Goldsmith of 77 Nassau Street, the apartment referred to in your letter of the 4th inst., Marcus Feldman saw the lease made to Goldsmith and Ben Schwartz stated that he would vacate the apartment. Mr. Brown's apartment was more than once flooded, because of your clients' neglect to shut off the faucets in the bath tub of their apartment, and this careless conduct on the part of your clients made their continued tenancy undesirable.

We shall expect your client to surrender the premises on the expiration of their lease as therein provided.

Yours respectfully,

JOSEPH A. SEIDMAN.

JS/RG.

Exhibit "C."

52 June 17, 1920.

Samuel R. Gerstein, Esq.,
299 Broadway,
New York City.

Dear Sir:

Permit me to direct your attention to the fact that upon inquiry I find that Messrs. Pease & Elliman, Inc., of 165 West 72nd St., and Nassoit & Lanning and L. J. Phillips & Co., have and are prepared to offer to let apartments of seven rooms at reasonable rental between $2600 and
53 $3500 per annum in the following apartments:

219 West 81st Street,
2178 Broadway,
2131 Broadway,
391 West End Avenue,
440 West End Avenue,
545 West 111th Street,

which evidently disproves the statement made by your clients referred to in your letter of the 4th inst., addressed to Marcus Brown Construction Co., that repeated attempts have been made by
54 them to find similar rooms in the neighborhood, and that they had been unsuccessful.

Furthermore, if you will authorize my client to negotiate for your clients a lease or leases for other and similar apartments, my client will do so. Copies of this letter, we this day mailed to your clients Mr. Marcus Feldman and Messrs. Schwartz Bros.

Yours very truly,

J. A. SEIDMAN.

Exhibit "D."

June 18, 1920. 55

Joseph A. Seidman, Esq.,
53 Park Row,
New York City.

Dear Sir:

Referring to your letter of June 17th, permit me to state that I am going to investigate all of the addresses mentioned by you and that I will let you know the results.

Yours truly,

SAMUEL R. GERSTEIN.

SRG:HMM. 56

July 9th, 1920.

Joseph A. Seidman, Esq.,
53 Park Row,
New York City.

Dear Sir:

This is to advise you that pursuant to your letter of June 17th, my clients visited every one of the apartments mentioned in your list and could not find a single one suitable to their needs.

My clients further advised me that your client had promised to renew their lease for them. My clients will endeavor and keep on looking for another apartment, even though a new lease was promised to them for the apartment they now occupy in order to avoid any litigation or trouble in the matter. However, if they cannot find a suitable apartment, you are again advised that my clients are willing to pay a reasonable increase for the apartment which they now occupy 57

Exhibit "D."

58 and shall be glad to close a lease with him at any time.

The fact is well known to your client that a new lease was promised to my clients upon which promise they relied and did some interior decoration.

Yours very truly,

SAMUEL R. GERSTEIN.

SGR:OB.

July 12, 1920.

Samuel R. Gerstein, Esq.,

59 299 Broadway,

New York City.

Dear Sir:

Yours of the 9th inst. received.

Permit me to state that your clients' statement to you to the effect that they had been promised a renewal of their lease is entirely unfounded and that it appears as if the only purpose of your letter is to create a certain kind of evidence.

On behalf of my client I now state that your clients were not promised a renewal of their

60 lease.

As your clients very well know, the apartment in question was leased to a third party on or about February 26th, 1920. Your clients were informed of this fact, and they have had ample time to act accordingly.

The list of apartments furnished to your clients was merely a courtesy extended by my client.

Very truly yours,

JOSEPH A. SEIDMAN.

Exhibit "E."

61

July 19th, 1920.

Samuel R. Gerstein, Esq.,
299 Broadway,
New York City.

Dear Sir:

On my return to town, I find your letter of the 14th inst., and I do not understand what you mean by stating that my client is trying to adjust the matter amicably. This is not a matter for adjustment, your clients have deliberately 62
stated that they did not intend to surrender possession of the premises at the expiration of their term, although they were shown the proposed lease that was to be entered into by the prospective tenant. Therefore you cannot expect my client to do otherwise than to insist upon their vacating the premises when the time comes.

Yours truly,

JOSEPH A. SEIDMAN.

63

JAS/BP.

Exhibit "F."

64

July 20th, 1920.

Samuel R. Gerstein, Esq.,
299 Broadway,
New York City.

Dear Sir:

Mr. Brown has just informed me that in the building adjoining his premises at No. 215 West 91st Street, there are two seven-room apartments to be had and if your clients are very anxious
65 to find apartments, they can get these on application to the superintendent of the premises, or the agent in charge of the renting of the same.

Yours truly,

JOSEPH A. SEIDMAN.

JAS/BF.

66

Bill of Complaint.

67

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

MARCUS BROWN HOLDING COMPANY,
Complainant,

—against—

MARCUS FELDMAN and BENJAMIN SCHWARTZ and 68
FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,
Defendants.

To the Honorable Judges of the District Court of the United States in and for the Southern District of New York:

The Marcus Brown Holding Company, a corporation organized under and pursuant to the laws of the State of New Jersey, and having its 69
principal offices and place of business in the City of Newark, State of New Jersey, brings this, its Bill of Complaint, against Marcus Feldman, Benjamin Schwartz, Frank Schwartz, citizens and residents of the State of New York, and Edward Swann, as District Attorney of the County of New York in the State of New York.

70 And thereupon your orator complains and says that on or about the 30th day of September, 1920, it became the owner in fee simple of the building and premises situated at No. 215 West 91st Street, Borough of Manhattan, City of New York, by virtue of a deed of conveyance duly executed by the Marcus Brown Construction Company, Inc., which said premises consist of a lot of land on which is erected a thirteen-story apartment house arranged for eighty-four different apartments, which said building and premises were on the date of said conveyance of the rea-
71 sonable market value of One million one hundred and seventy-five thousand dollars, and that such conveyance was made prior to the expiration of the term mentioned in the lease hereinafter described.

And your orator further shows that the value of such building and premises as hereinabove described depends wholly upon the rental value thereof and the freedom of the owner to lease the whole and the several parts of said premises to persons of its own choosing and at the highest price obtainable from persons desiring to occupy the same.

72 And your orator further shows that by the said conveyance made to it by the said Marcus Brown Construction Company, Inc., as aforesaid, the latter duly assigned to this complainant all of its right, title and interest in and to any and all leases and contracts entered into between the said Marcus Brown Construction Company, Inc., and the persons occupying the said premises on the date of said conveyance and at the same

time your orator assumed all of the obligations 73
imposed by the said leases upon its said grantor and by it to be performed, including leases which were to become operative on and after October 1st, 1920.

And your orator further shows that on or about the 27th day of June, 1917, the said Marcus Brown Construction Company, Inc., duly entered into a lease in writing with the defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz, wherein and whereby the said Marcus Brown Construction Company, Inc., let unto said defendants and said defendants hired from 74
the said Marcus Brown Construction Company, Inc., for a term of three years commencing on October 1st, 1917, and ending on September 30th, 1920, the seven-room apartment No. 92 on the ninth floor of the said premises.

And your orator further shows that on the date of said conveyance made by the said Marcus Brown Construction Company, Inc., to your orator as aforesaid, the said defendant lessees did then and there duly attorn to your orator and held and possessed said apartment as the tenants of your orator.

And your orator further shows that in and by 75
the said lease the said defendants as such lessees duly agreed to surrender the possession of said apartment to the grantor of your orator and to its successors in title, to wit, your orator, and that it became the duty of said defendant lessees under the laws of the State of New York in force at the time when said lease was made to vacate said apartment and to surrender the pos-

76 session of it to your orator on the date of the expiration of the term of said lease, to wit, on the 30th day of September, 1920, at 12 o'clock P. M.

And your orator further shows that on the 1st day of October, 1920, and thereafter and prior to the date of the filing of this bill, your orator duly demanded of the said defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz the possession of said apartment, and that they and each of them vacate said premises, which said defendants refused to do.

77 And your orator further shows that prior to the adoption of the first Constitution of the State of New York, and ever since, it was and still is the law of the State of New York that all lands within the said State are vested in the owner subject only to the right of the State to impose taxes for the common welfare, and subject to escheat and the right of eminent domain to take such property for public use upon payment to the owner of proper compensation.

And your orator further shows that at the time when the said lease was entered into with said defendants as aforesaid it was the law of 78 the State of New York, as declared by the highest courts of that State, and by the common law in force before and since the said State became one of the United States of America, that every person holding over against the will of the owner after the expiration of the term of a lease is and should be treated as a trespasser wrongfully interfering with the possession, use and enjoyment of the property of the owner, for which such

wrong-doer was made responsible to the owner for all damages caused by such trespass, and at the time when the said lease was entered into with said defendants as aforesaid there were in force several statutes duly enacted by the Legislature of the State of New York which provided that on the termination of the term granted by any lease, when the owner, entitled to the possession of premises demised, demands the same and serves written notice to quit, if the tenant in possession wilfully holds over after the expiration of thirty days from the date of service of such notice, he, the person holding over, must pay to the person kept out of possession at the rate of double the yearly value of the property detained, for the time which he so detains the same, together with all damages incurred by the person kept out of possession. 79 80

And your orator further shows that at the time when said lease was entered into with said defendants it was the law of the State of New York, as declared by the highest courts of that State, that the true owner of real property wrongfully held out of possession may and is, without any action or proceeding at law or in equity, entitled to regain peaceable possession and could lawfully use such force as is necessary to overcome the resistance of the person wrongfully detaining such property, without being liable in damages or subject to penalty. 81

And your orator further shows that by the statutes duly enacted by the Legislature of the State of New York and in force at the time when said lease was entered into with the said de-

82 fendants as aforesaid it is provided that an owner lawfully entitled to possession of real property held over against his will by the person in possession thereof is entitled to maintain an action for the recovery of the possession of such property, and is entitled in such action to recover all damages sustained by him, to wit, the rent and profits, or the value of the use and occupation of real property recovered.

And your orator further shows that by the statutes duly enacted by the Legislature of the State of New York and in force at the time when
83 the said lease was entered into with the said defendants as aforesaid it is also provided that an owner of property situated in the State of New York is entitled to maintain summary proceedings to recover the possession of real estate in possession of a person holding over after the expiration of a lease, and that in such summary proceedings, upon proof that such possession was withheld from the true owner against his will after the expiration of the term in the lease mentioned, under which the person holding over came into possession of said premises, it is the duty of the court in which such proceeding is
84 commenced to grant a final order awarding the possession of the premises to the lawful owner and to issue a warrant to oust the person holding over from the possession of said premises.

And your orator further shows that, except as hereinafter stated, all of the said laws, whether declared by the highest judicial tribunals in the State of New York or by the statutes duly enacted by the Legislature of the State of New

York, at all times since the said lease was entered into with the said defendants as aforesaid, were, and still are, the laws of the State of New York which entered into and formed part of the lease made and entered into with the said defendants as aforesaid. 85

And your orator further shows that the land and premises hereinabove described were not acquired by the complainant or its predecessor in title by any grant made by or purchase from the State of New York, and that the said property was acquired and that the ownership thereof was vested in the complainant's predecessors in title before New York became a State and one of the States of the United States of America. 86

And your orator further shows that due notice and demand, in writing, was duly served upon the said defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz thirty days prior to the expiration of the term of said lease made and entered into as aforesaid, and that the complainant's predecessor in title in such notice demanded that the said defendants quit and surrender the possession of said premises and vacate the same on the 30th day of September, 1920, and that between the time when the said notice was given and the said 30th day of September, 1920, the said defendants, by the exercise of ordinary diligence, could have obtained an apartment in the City of New York to be used and occupied by them on and after the said 1st day of October, 1920, but that the said defendants failed and refused to vacate the said premises and to quit and surrender the possession thereof and to pro- 87

88 cure another apartment to be used and occupied by them on or after the said 30th day of September, 1920.

And your orator further shows that the Legislature of the State of New York during the year of 1920, for the purpose and with intent to impair the obligations created by the contract entered into between the complainant's predecessor in title and the said defendant and duly assigned to the complainant as aforesaid, contrary to and in contravention of the Constitution of the United States of America, enacted several laws hereinafter more particularly described by which the
89 said Legislature of the State of New York attempted to and did, in fact, cause the repeal and nullification of the laws hereinabove mentioned and in force and in effect at the time when the said lease was made and entered into with said defendants as aforesaid, and the said State Legislature, contrary to and in contravention of the Constitution of the United States of America and the acts of Congress duly enacted, did declare that except in the cases excluded from the operation of said laws so enacted by the said State Legislature during the year of 1920, no owner of
90 real property situated in the City of New York should have the right to disturb the use and enjoyment of real estate belonging to him and in the possession of persons holding over against his will; that no action or proceeding should be maintained in any court of the State of New York for the recovery of possession of property belonging to any owner thereof against any person wrongfully in possession thereof against the

will, and without the consent, of such owner; 91
that no owner of property shall have the right to recover damages for the wrongful detention and use of his property by a person holding over, and that it shall be unlawful for any owner of property situated in the City of New York to refuse to serve the person wrongfully detaining the possession of his property steam heat, elevator service, hot and cold water, and other things which by the terms of any lease at any time made the owner of such property was required to furnish during the term of the demise, and that it shall be unlawful for such owner to refuse to 92
serve such occupant and to refuse to furnish such occupant with steam heat, elevator service, hot and cold water supply after the expiration of such demise and while the person holding over remains and continues to remain in possession of such premises.

And your orator further shows that under color of such statutes so enacted by the State Legislature of the State of New York the said defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz claim the right to remain and continue in the possession of the said premises against the will and without the consent 93
of this complainant, and that it is claimed by them and by the legislative, executive and judicial officers of the State of New York that by the said laws enacted by the said State Legislature during the year of 1920 the term of the demise as expressed in the said lease made with the said defendants as aforesaid was extended from the 1st day of October, 1920, until the 1st day of

94 November, 1922, and that all terms and conditions contained in the said lease made and entered into with the said defendants as aforesaid were operative, and that all the obligations assumed by the said owner continue during the period commencing October 1st, 1920, and ending November 1st, 1922, although the laws so enacted by the said State Legislature of the State of New York during the year of 1920 imposed no obligation of any kind upon the person occupying the premises to remain or to continue in possession thereof during the said period and
95 pay rent for the entire period of twenty-five months, to wit, from October 1st, 1920, to November 1st, 1922.

And your orator further shows that by these laws so enacted by the State Legislature of the State of New York during the year 1920, and enumerated in the exhibit hereto annexed marked "A" and made a part of this Bill of Complaint, the said Legislature of the State of New York, contrary to and in contravention of the Constitution of the United States and of the acts of Congress of the United States hereinafter referred to, did, without due process of law, take
96 away the property rights and property of this complainant and other owners of property in the City of New York and transfer such property of this complainant to the defendants herein and other private individuals occupying buildings in the City of New York for dwelling purposes, and that by reason of the said legislation the property of this complainant hereinabove described became encumbered and unmarketable, and this complain-

ant is no longer able to convey the same free 97
and clear from the encumbrance thus created for the benefit of the said defendants and numerous other occupants in said premises, who, like the defendants, are holding over the possession of numerous apartments without the consent and against the will of your complainant; and that by reason of such encumbrance and the deprivation of the right of property created by and resulting from these laws, the property of this complainant owned by it as aforesaid, is very much diminished in value and that the damages resulting therefrom and caused thereby and suf- 98
fered by this complainant exceed in amount the sum of One Hundred Thousand ($100,000) Dollars.

And your orator further shows that by these laws enacted by the Legislature of the State of New York during the year 1920, as aforesaid, your orator is denied and unable to enforce in the judicial tribunals of the State of New York rights secured to it as citizens of the United States by the Constitution of the United States of America and by the Civil Rights Act duly adopted by Congress of the United States known as Sections 3925 and 3932 of the Compiled 99
Statutes of the United States for the year 1918, which provide that all persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue and be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property; and that every person who

100 under color of any statute, ordinance, regulation, custom, or usage of any State or territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

And your orator further shows that the said defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz, under color of the statutes
101 enacted by the State Legislature of the State of New York during the year 1920, as aforesaid, not only continue to wrongfully detain the possession of the premises aforesaid, but they also occupy and maintain therein cumbersome furniture and fixtures in large quantities which may only be removed by them and which neither this complainant nor any officer of this Court may remove without infringing upon the rights of other members of the community of the City of New York and without violating the ordinances, rules and regulations lawfully enacted and which may be enforced by the Municipal and State au-
102 thorities in the City and State of New York.

And your orator further shows that sidewalks in the City of New York form part of the public highway of the City of New York and that no person may encumber or obstruct the public highway by placing thereon anything which may impede or interfere with the use of such highway and public traffic without becoming guilty of a misdemeanor and subject to punishment for

the violation of the ordinances duly enacted in accordance with law. 103

And your orator further shows that since the 1st day of October, 1920, the said defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz have trespassed and continue to trespass upon your orator's property aforesaid, and that such trespass is continuous and will continue to the great injury and detriment of this complainant and to the injury of its property, and that such trespass is wilful and deliberate and wrongfully committed under color of said statutes so enacted by the said State Legislature, as aforesaid, and that in order that the complainant may be compensated for all the damages caused by the said defendants and by their wrongful use and occupation of the complainant's said premises, the wrongful use of its elevator service, the services of hallmen and other servants employed in and about said premises, and for the wrongful use of steam heat, and hot and cold water supplied by this complainant, numerous actions and suits would have to be instituted resulting in the multiplicity of suits and actions at law, and that any recovery in any such action or suit would not and could not be an adequate remedy for the wrongs committed, done, and continued to be done, by these defendants to the injury of the complainant. 104 105

And your orator further shows that by Chapter 951 of the Laws of the State of New York enacted by the said State Legislature during the year 1920, described in Exhibit "A" and made part of this bill, it is the duty of the defendant

Edward Swann, as District Attorney of the County of New York, to prosecute the complainant and every other owner of property in the City of New York should your orator or any other owner refuse to furnish heat, hot or cold water, light, power, elevator service, telephone service, or any other service or facility to the defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz or to any other occupant of the said building, and for interfering with the quiet enjoyment of the premises so occupied by the said defendants and any other occupant of said building, although such occupancy is without any contract or agreement made by this, your orator, or its predecessor in title, and although the occupancy of said premises by the said defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz and other persons now in possession of the premises owned by your complainant as aforesaid is without its consent and against its will, and that should the said defendant District Attorney in the performance of the duties of his office institute proceedings for the prosecution of this complainant, its agents and servants in accordance with the provisions of the said laws enacted contrary to and in contravention of the Constitution of the United States of America and the said Civil Rights Act hereinabove mentioned, your orator and its agents and servants would be subjected to numerous penalties, fines and sentences for each and every separate act committed or done by your orator, its agents or servants which in any way would amount to an interference with the use and en-

joyment of your orator's property by persons wrongfully occupying the same, and that such penalties and fines, besides the possible imprisonment of the officers, agents and servants of your orator, would be large and numerous and exceed the sum of Three Thousand ($3,000) Dollars: that by reason of the said statutes your orator is unable to refuse to permit the said occupants of its premises the elevator service and the use of steam heat and hot and cold water without being in peril of large loss and its agents in great risk of fine and imprisonment if it should be finally determined that the said acts are valid; that by the said statute your orator is deprived of its vested rights in its property and that by the enforcement of the said statute and the acts of the Legislature as aforesaid the vested rights to the use and enjoyment of property secured to your orator by the Constitution of the United States and the acts of Congress as aforesaid will be destroyed and rendered worthless.

And your orator further shows that the matter in controversy is in excess of the sum of Three Thousand ($3,000) Dollars, exclusive of interest and costs; that the value of the use and occupation of the premises herein described and wrongfully used and occupied by the defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz is in excess of Three Thousand ($3,000) Dollars.

And your orator further shows that it is informed and verily believes that the said defendants, prior to the filing of this bill, advised the officers and agents of your orator that should

112 the officers and agents of your orator attempt to interfere with the use and enjoyment of the said premises by the said defendants or by any other person occupying the same or any other part of the said building, that your orators, its officers, agents and servants would be charged with the commission of a misdemeanor and prosecuted separately for each and every act so done or committed in violation of the said statute so enacted by the Legislature of the State of New York as aforesaid, which said statute, as your orator is advised and verily believes, is contrary
113 to and in contravention of the Constitution of the United States of America.

And your orator further shows that the provisions of the said several acts of the Legislature of the State of New York enumerated in the exhibit hereto annexed, marked "Exhibit A" and made part of this complaint, are in contravention of the acts of Congress hereinabove mentioned and of the Constitution of the United States of America, known as Article 1, Section 10, which, among other things, provides that no State shall pass any bill of attainder and ex post facto law or law impairing the obligation of contracts, and
114 that the said statutes and laws are in contravention and in violation of the provisions of the Fifth Amendment to the Constitution of the United States of America, which provides that no person shall be deprived of life, liberty or property without due process of law, and that private property shall not be taken for public use without just compensation: that said statutes and laws so enacted are in contravention and

in violation of the provisions of the Thirteenth 115
Amendment to the Constitution, which provides that neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction; that the said statutes and laws so enacted are in contravention of and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, which, among other things, provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United 116
States, and that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

And your orator further shows that the said laws and statutes above referred to still continue to secure to the owners of property other than buildings occupied for dwelling purposes in the City of New York rights and privileges to recover possession of real property wrongfully used and occupied by any person without the consent of the owner, and these laws confer upon owners of buildings erected after the passage of said 117
laws, although used for dwelling purposes, the freedom to make any contract respecting the use and occupation of such premises and to recover the possession thereof for default in payment of rent or after the expiration of the term of the demise; that by these laws so enacted as aforesaid every occupant of dwelling houses in the City of New York is secured in the enforce-

ment of every contract made and entered into by him with any owner of property in the City of New York, whether used for dwelling purposes or otherwise, but that by these laws all the rights and immunities secured as aforesaid to other persons is denied to owners of buildings used for dwelling purposes but which were erected prior to the enactment of said laws; that the said laws and statutes above referred to make unreasonable and arbitrary discrimination between different persons and classes of persons and grant special privileges for the benefit of individuals other than owners of buildings used for dwelling purposes and not classed as hotels inconsistent with the general laws of the land, the Civil Rights Act and the Constitution of the United States of America. Said laws grant to occupants of buildings used for dwelling purposes the right to rescind and annul contracts duly entered into prior to the enactment of the laws complained of, and to force the owners of such buildings to accept as compensation for the use and occupancy of such buildings compensation adjudged to be fair and reasonable, while at the same time said laws deny to the owners of such buildings the right to rescind and annul such contracts or leases and to obtain reasonable compensation in excess of the sum or amount reserved and stipulated in such contracts or leases, and by these laws your complainant, as well as other owners of buildings used for dwelling purposes, is deprived of the liberty to make contracts and to use property belonging to it, which, in effect, amounts to confiscation and tak-

ing of such property without due process of law; that such laws were enacted for the purpose and with intent to discriminate between persons and classes of persons in order to take the property from one class of persons and transfer the same over to another class of persons, depriving the owner of property the right to use and enjoy the same in accordance with the fundamental principles of law, and to grant and give unto another class of persons for their private and individual use and not for the public benefit the property of the owner, without his consent or permission; that such legislation was so enacted to affect and make ineffective and null and unenforcible contracts duly made and entered into prior to the date of the enactment of such laws and to affect and relate back to previous transactions had between parties and citizens of different classes according to the form and in the manner provided by the laws existing at the time of the execution of such contracts, and that the said laws so enacted are retroactive and hinder and prevent the enforcement of rights and remedies to which the owner of property is entitled under the contracts so made and entered into; that by enacting the said laws aforesaid the Legislature of the State of New York intended to and did in effect reduce the value of property belonging to this complainant, and also the value of other property used for dwelling purposes and made the value of such buildings uncertain and speculative because of the inability of the owner to enforce contracts entered into prior to the enactment of said laws, which said contracts were

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so made and entered into based upon the laws existing and in force at that time which conferred upon the owner of property the right to reject by summary proceedings or action persons holding over against his will; and that by these laws the owner of property is compelled to render involuntary service to persons trespassing upon his property all of which is contrary to and in contravention of the Constitution of the United States and the several amendments thereto.

And your orator further shows that as a result of the wrongs committed by the said defendants and each of them the complainant has suffered and will continue to suffer irreparable damages for which it has no adequate remedy at law in this Court.

For, as much as your orator can have no adequate relief except in this Court, and to that end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and may make full answer to this bill of complaint, it prays:

1. That the defendant Edward Swann, as District Attorney of the County of New York, be enjoined and restrained from instituting proceedings or actions of any kind for any act done or committed or omitted by the complainant, its officers and agents, for its or their failure or refusal to furnish steam heat, hot and cold water, elevator service, or any other service or thing to the defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz, or any other per-

son occupying any part of the building, the property of your complainant, and without its consent or permission and holding over against its will after October 1st, 1920, under color of the statutes and laws enacted by the said Legislature during the year 1920: 127

2. That the defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz, their agents and servants, be enjoined and restrained from entering upon or continuing to occupy the apartment herein described or to make use of any of the property belonging to this complainant without the complainant's consent; and 128

3. That each of the Chapters 942, 943, 944, 945, 946, 947, 948, 949, 950, 951 and 952 and Chapters 131, 132, 135, 136, 137 and 138 of the Laws of 1920 of the State of New York, hereinabove mentioned, be adjudged null and void and in contravention of the provisions of the Constitution of the United States of America:

4. That your complainant have such other and further relief as the equity of the case may require and your Honors may seem meet. 129

That your Honors grant unto your orator not only a writ of injunction conformable to the prayer of this bill of complaint, but also a writ of subpoena of the United States of America directed to Marcus Feldman, Benjamin Schwartz, Frank Schwartz, and Edward Swann, as District Attorney of the County of New York in the State

130 of New York, commanding them on a day certain to appear and answer unto this bill of complaint and to abide by and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

JOSEPH A. SEIDMAN,
Solicitor for Complainant,
Office and Post Office Address,
63 Park Row,
Borough of Manhattan,
City of New York.

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MARCUS BROWN HOLDING COMPANY, Inc.,

By Louis Brown,
Secretary,
Complainant.

132

Exhibit A, Attached to Bill of Complaint.

133

Code of Civil Procedure:

Sec. 1531. *"Damages recoverable; set-off by defendant.*

In an action, brought as prescribed in this article, the plaintiff, where he recovers judgment for the property, or possession of the property, is entitled to recover as damages, the rents and profits, or the value of the use and occupation, of the real property recovered, for a term not exceeding six years; but the damage shall not include the value of the use of any improvements 134
made by the defendant, or those under whom he claims, while holding, under color of title, adversely to the plaintiff, the value thereof must be allowed to the defendant, in reduction of the damages of the plaintiff, but not beyond the amount of those damages."

Chapter 135, Laws of 1920 (enacted April, 1920).

Sec. 1531-a. "When an action under this article is brought against a person or persons in possession under the terms of a lease, express or 135
implied, upon the ground that such person holds over after the expiration of the term of such lease or upon the ground that such person holds over after a default by him in the payment of the rent reserved in such lease or any instalment thereof, the answer may set up as a defense or counterclaim any state of facts which pursuant to the provisions of Title 2 Chapter XVII may be pleaded

136 as a defense or counterclaim to a proceeding instituted under such title. The court may render affirmative judgment on such a counterclaim. An answer pleading such defense may be oral or in writing. If oral, the defendant must, before the time for answering expires, appear before the Clerk of the Court and state the facts constituting such defense and the latter must indorse the same briefly on the complaint."

Chapter 947, Laws of 1920 (enacted September 27, 1920).

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"An Act to amend the Code of Civil Procedure, in relation to actions to recover the possession of real property in certain cities and to repeal Section 1531-a thereof."

"Section 1. Article 1 of Title 1 of Chapter XIV of the Code of Civil Procedure is hereby amended by adding at the end a new section, to be Section 1531-a, to read as follows:

"Section 1531-a. A public emergency existing, no action as prescribed in this article shall be
138 maintainable to recover possession of real property in a city of a population of one million or more or in a city in a county adjoining such city, occupied for dwelling purposes, except an action to recover such possession upon the ground that the person is holding over and is objectionable, in which case the landlord shall establish to the satisfaction of the Court that the person holding over is objectionable; or an action where the

owner of record of the building, being a natural person, seeks in good faith to recover possession of the same or a room or rooms therein for the immediate and personal occupancy by himself and his family as a dwelling; or an action to recover premises for the purpose of demolishing the same with the intention of constructing a new building, plans of which new building shall have been duly filed and approved by the proper authority. 139

"This section shall be in effect only until the first day of November, nineteen hundred and twenty-two.

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"Section 2. Section fifteen hundred and thirty-one-a of such code, as added by chapter one hundred and thirty-five of the laws of nineteen hundred and twenty, is hereby repealed.

"Section 3. This act shall take effect immediately."

Chapter 136, Laws of 1920 (enacted April, 1920).

"Section 1. Unjust, unreasonable and oppressive agreements for the payment of rent having been and being now exacted by landlords from tenants under stress of prevailing conditions whereby the freedom of contract has been impaired and congested housing conditions resulting therefrom have seriously affected and endangered the public welfare, health and morals in certain cities of the state, and a public emergency existing in the judgment of the legisla- 141

142 ture by reason thereof, it shall be a defense to an action for rent accruing under an agreement for premises in a city of the first class or in a city in a county adjoining a city of the first class occupied for dwelling purposes, other than a room or rooms in a hotel, lodging house or rooming house, that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive.

"Section 2. Where it appears that the rent has been increased more than twenty-five per centum over the rent as it existed one year prior
143 to the time of the agreement under which the rent is sought to be recovered, such agreement shall be presumptively unjust, unreasonable and oppressive.

"Section 3. Nothing herein contained shall prevent the plaintiff from pleading and proving in such action a fair and reasonable rent for the premises and recovering judgment therefor, or from instituting a separate action for the recovery thereof.

144 "Section 4. This act shall take effect immediately and shall be in force until November first, nineteen hundred and twenty-two."

Chapter 944, Laws of 1920 (enacted September, 1920).

"Section 1. Chapter one hundred and thirty-six of the laws of nineteen hundred and twenty,

entitled, 'An act in relation to defenses in actions based upon unjust, unreasonable and oppressive agreements for rent of premises occupied for dwelling purposes in cities of the first class or in cities in a county adjoining a city of the first class' is hereby amended to read as follows: 145

"Section 1. Unjust, unreasonable and oppressive agreements for the payment of rent having been and being now exacted by landlords from tenants under stress of prevailing conditions whereby the freedom of contract has been impaired and congested housing conditions resulting therefrom have seriously affected and endangered the public welfare, health and morals in certain cities of the state, and a public emergency existing in the judgment of the legislature by reason thereof, it shall be a defense to an action for rent accruing under an agreement for premises in a city of the first class or in a city in a county adjoining a city of the first class occupied for dwelling purposes that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive. 146

"Section 2. Where the answer contains the defense mentioned in section one of this act, the plaintiff within five days after the filing of the answer or within such time as the Court upon good cause shown may determine, shall file with the Clerk of the Court a verified bill of particulars, setting forth the gross income derived from the building of which the premises in question 147

148 are the whole or a part; the number of apartments in the building and the number of rooms in each apartment, and the number of stores in such building; the rent received from each such apartment or store for the period of one year last past; the consideration paid by the landlord for the building, if he be the owner thereof, or if he be the lessee the rent agreed to be paid by him; the assessed valuation of the property and the taxes for the current year; the annual interest charge on any encumbrance paid by the landlord; the operating expenses with rea-
149 sonable detail; and such other facts as the landlord claims affect his net income from such property. Issue shall not be deemed joined until the filing of such bill of particulars. Upon the plaintiff's failure to file said bill of particulars within the time limited the Court upon motion of the defendant shall dismiss the complaint.

"Section 3. Where it appears that the rent has been increased over the rent as it existed one year prior to the time of the agreement under which the rent is sought to be recovered, such agreement shall be presumptively unjust, unreasonable and oppressive.
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"Section 4. Nothing herein contained shall prevent the plaintiff from pleading and proving in such action a fair and reasonable rent for the premises and recovering judgment therefor, or from instituting a separate action for the recovery thereof.

"Section 5. If an action against the occupant of premises for rent and for the rental value of

the use or occupation thereof, the plaintiff re- 151
covers judgment by default the judgment shall contain a provision that if the same be not fully satisfied within five days after entry and service upon the defendant of a copy thereof, the plaintiff shall be entitled to the premises mentioned in the complaint and to the direction that a warrant shall issue commanding the sheriff, marshal or other officer charged by law with the duty of executing judgments to remove all persons therefrom.

"Section 6. If in any action for rent or rental value, the issue of fairness and reasonableness of 152
the amount demanded in the complaint be raised by the defendant, he must at the time of answering deposit with the clerk such sum as equals the amount paid as rent during the preceding month or such as is reserved as the monthly rent in the agreement under which he obtained possession of the premises. If the defendant fail to make such deposit, the Court shall strike out the denial or defense raising such issue. Such deposit shall be applied to the satisfaction of the judgment rendered or otherwise disposed of as justice requires. Where a judgment is
rendered for the plaintiff it shall contain a pro- 153
vision that if the same be not fully satisfied from the deposit or otherwise within five days after the entry, and service on the defendant of a copy thereof, the plaintiff shall be entitled to the premises described in the complaint and a direction that a warrant shall issue commanding the sheriff, marshal or other officer charged

by law with the duty of executing judgments to remove all persons therefrom.

"Section 7. Whenever the Court in which the action is brought has jurisdiction to vacate a judgment rendered upon default, it shall have power to open a default in an action mentioned in Section 5 of this act to vacate, amend, correct or modify any process, judgment or warrant in furtherance of justice for any error in form or substance, and to grant a new trial upon any of the grounds for which a new trial may be granted by the Supreme Court in an action pending therein.

"Section 8. In case of an appeal by the defendant, the execution of the judgment and warrant shall not be stayed, unless the defendant shall deposit with the clerk of the Court the amount of the judgment and thereafter monthly until the final determination of the appeal an amount equal to one month's rental computed on the basis of the judgment. The Clerk shall forthwith pay to the plaintiff the amount or amounts so deposited.

"Section 9. This act shall not apply to a room or rooms in a hotel containing one hundred and twenty-five rooms or more, or to a lodging house or rooming house occupied under a hiring of a week or less.

"Section 10. This act as hereby amended shall not apply to a new building in the course of construction at the time this amendment takes effect or commenced thereafter and shall be in

force until November first, nineteen hundred and twenty-one. 157

"Section 2. This act shall take effect immediately."

Chapter 131, Laws of 1920 (enacted April, 1920).

"An act to amend the penal law, in relation to wilful violation of the terms of a lease."

"Section 1. The penal law is hereby amended by inserting therein, at the end of article one hundred and eighty-two, a new section, to be section two thousand and forty, to read as follows: 158

"'Section 2040. *Wilful Violation of the Terms of a Lease.* Any lessor of any building, or part thereof, who is required by the terms, expressed or implied, of any contract or lease to furnish water, heat, light, power, elevator service or telephone service to any occupant of said building, who wilfully or intentionally fails to furnish such water, heat, light, power, elevator service or telephone service at any time when the same are necessary to the proper or customary use of such building, or part thereof, or any lessor who wilfully or intentionally interferes with the quiet enjoyment of the leased premises by such occupant, is guilty of a misdemeanor. 159

Exhibit "A" Attached to Bill of Complaint.

"'Section 2. This act shall take effect immediately.'"

Chapter 951, Laws of 1920 (enacted September, 1920).

"An act to amend the penal law, in relation to wilful violation of the terms of a lease."

"Section 1. Section two thousand and forty of the penal law is hereby amended to read as follows:

"'Section 2040. Wilful violation of the terms of a lease. Any lessor, agent, manager, superintendent or janitor of any building, or part thereof, the lease or rental agreement whereof by its terms, expressed or implied, requires the furnishing of hot or cold water, heat, light, power, elevator service, telephone or any other service or facility to any occupant of said building, who wilfully or intentionally fails to furnish such water, heat, light, power, elevator service, telephone service or other service or facility at any time when the same are necessary to the proper or customary use of such building, or part thereof, or any lessor, agent, manager, superintendent or janitor who wilfully and intentionally interferes with the quiet enjoyment of the leased premises by such occupant, is guilty of a misdemeanor.

Exhibit "A" Attached to Bill of Complaint.

"'Section 2. This act shall take effect immediately.'" 163

Code of Civil Procedure, Sec. 2244. *Answer.*

"At the time when the precept is returnable without waiting as prescribed in an action before a justice of the peace, or on a district in the city of New York, the person to whom it is directed or his landlord, or any person in possession or claiming possession of the premises, or a part thereof, may answer, orally or in writing, denying generally the allegations, or specifically any material allegation of the petition, or setting forth a statement of any new matter constituting a legal or equitable defence, or counterclaim. Such defense or counterclaim may be set up and established in like manner as though the claim for rent in such proceeding was the subject of an action. If such answer be oral the substance thereof shall be endorsed upon the petition. (Am. by L. 1882, ch. 399; L. 1893, ch. 705; L. 1919, ch. 639 in effect May 19, 1919.) 164

Chapter 132, Laws of New York (Enacted April, 1920). 165

"Section 1. Section twenty-two hundred and forty-four of the code of civil procedure is hereby amended to read as follows:

"'Sec. 2244. *Answer.* At the time when the precept is returnable without waiting as prescribed in an action before a justice of the peace, or in

166 a district court in the city of New York, the person to whom it is directed or his landlord, or any person in possession or claiming possession of the premises, or a part thereof, may answer, orally or in writing, denying generally the allegations, or specifically any material allegation of the petition, or setting forth a statement of any new matter constituting a legal or equitable defence, or counterclaim. Such defence or counterclaim may be set up and established in like manner as though the claim for rent in such proceeding was the subject of an action. If the Court
167 finds that a defence or counterclaim has been established in whole or in part, it shall, upon rendering a final order, determine the amount of rent due to the petitioner or make such other proper disposition as shall determine the rights of the parties, and may give affirmative judgment for the amount found to be due on the counterclaim. If such answer be oral the substance thereof shall be endorsed upon the petition.

"'Sec. 2. This act shall take effect immediately.'"

168 *Code of Civil Procedure,* Section 2231.

When Tenant May Be Removed.

"In either of the following cases, a tenant or lessee at will, or at sufferance or for part of a year, or for one or more years, of real property, including a specific or undivided portion of a house, or other dwelling, and his assigns, under-

tenants, or legal representatives, may be removed 169
therefrom, as prescribed in this title:

"1. When he holds over and continues in possession of the demised premises, or any portion thereof, after the expiration of his term, without permission of the landlord; including, elsewhere than in the city of New York and Brooklyn, a case where the person to be removed became the occupant of the premises as a servant or employee and the relation of master and servant or employee and employee has been lawfully terminated or the time fixed for such occupancy by the agreement between the parties, has expired; but if 170
by such agreement the servant was to be permitted to occupy such premises for a period beyond the term of employment such removal shall not be had under this subdivision unless such period so permitted for occupancy has expired, or the relation of master and servant or employer and employee was lawfully terminated before the expiration of such terms of employment; but nothing in this subdivision contained shall be construed as preventing the removal of such occupant in any other lawful manner (Am. by L. 1894, ch. 333.)

"2. Where he holds over, without like per- 171
mission, after a default in the payment of rent, pursuant to the agreement under which the demised premises are held, and a demand of the rent has been made, or at least three days' notice in writing, requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served, in behalf of the person entitled to the rent, upon the person owing it, as

prescribed in this title for the service of a precept.

"3. Where in any city in this State he holds over and continues in possession of the demised premises, or any portion thereof, after default in the payment, for sixty days, after the same shall be payable, of any taxes or assessments levied on such demised premises which he has agreed in writing to pay pursuant to the agreement under which the demised premises are held, and a demand for the payment of such taxes or assessments has been made, or at least three days' notice in writing, requiring, in the alternative, the payment thereof and of any interest and penalty thereon, or the possession of the premises, has been served, on behalf of the landlord, upon the lessee, as prescribed in this title for the service of a precept. An acceptance of any rent by the lessor or his legal representatives shall not be construed as a waiver of the agreement of the lessee to pay taxes or assessments, so as to preclude the lessor from the benefits of this chapter.

4. Where he, being in possession under a lease for a term of three years or less, has, during the term, taken the benefit of an insolvent act, or has been adjudicated a bankrupt, under a bankrupt law of the United States.

5. Where the demised premises, or any part thereof, are used or occupied as a bawdy house or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal

trade or manufacture, or other illegal business. 175
(Subd. am. by L. 1913, ch. 448. Whole section amended by L. 1885, ch. 13.)"

Derivation.—R. S. pt. 3, ch. 8, tit. 19, sec. 28, subds. 1, 2 and 3, as amended by L. 1849, ch. 193; L. 1868, ch. 764, S. 1; L. 1873, ch. 583, S. 1.

Chapter 133, Laws 1920 (enacted April, 1920).

"Section 1. Section twenty-two hundred and thirty-one of the code of civil procedure is hereby amended by adding thereto a new subdivision, to 176
be subdivision six, to read as follows:

"6. A proceeding seeking to recover possession of real property by reason of the termination of the term fixed in the lease pursuant to a provision contained therein giving the landlord the right to terminate the time fixed for occupancy under such agreement, if he deem the tenant objectionable, shall not be maintainable unless the landlord shall by competent evidence establish to the satisfaction of the court that the tenant is objectionable.

177
"Sec. 2. This act shall take effect immediately."

Chapter 139, Laws of 1920 (enacted April, 1920).

"Section 1. Section twenty-two hundred and thirty-one of the code of civil procedure is hereby

178 amended by inserting therein a new subdivision to be subdivision two-a, to read as follows:

"2-a. No proceeding as prescribed in subdivision two of this section shall be maintainable to recover the possession of real property in a city of the first class or in a city in a county adjoining a city of the first class, occupied for dwelling purposes, other than a room or rooms in a hotel, lodging house, or rooming house, under a lease or tenancy for one year or less or under any lease or tenancy commencing after this subdivision takes effect, unless the petitioner alleges in the
179 petition and proves that the rent of the premises described in the petition is no greater than the amount paid by the tenant for the month preceding the default for which the proceeding is brought or has not been increased more than twenty-five per centum over the rent as it existed one year prior to the time of the presentation of the petition. Nothing in this subdivision shall preclude the tenant from interposing any defense that he might otherwise have. This subdivision shall be in effect only until the first day of November, nineteen hundred and twenty-two.

180 "Sec. 2. This act shall take effect immediately."

Chapter 948, Laws of 1920 (enacted September, 1920).

"Section 1. The title of chapter one hundred and thirty-seven of the laws of nineteen hundred and twenty, entitled, 'An act in relation to sum-

mary proceedings to recover the possession of 181
real property in cities of the first class or in cities in a county adjoining a city of the first class during the existing emergency,' is hereby amended to read as follows:

"An act in relation to summary proceedings to recover the possession of real property in certain cities of the first class during the existing emergency.

"2. Section one of such act is hereby amended to read as follows:

"Sec. 1. Application. The provisions of this 182
act shall apply only to a summary proceeding in a city of the first class having a population of one million or less to recover the possession of premises occupied for dwelling purposes, other than a room or rooms in a hotel, lodging house, or rooming house, upon the ground that the occupant is holding over and continuing in possession of the premises after the expiration of his term, without permission of the landlord, and shall govern such a proceeding notwithstanding the provisions of any general or special act inconsistent herewith. The relief hereby provided shall be in 183
addition to relief provided by any other act the provisions of which are not inconsistent herewith. This act being emergency legislation, its provisions shall be liberally construed to carry out the intent thereof. This act as amended shall not apply to a new building in the course of construction at the time this amendment takes effect or commenced thereafter.

Exhibit "A" Attached to Bill of Complaint.

184 "Sec. 3. This act shall take effect immediately and shall be in force until November first, nineteen hundred and twenty-two."

Chapter 942, Laws of 1920. (Enacted September, 1920.)

"Section 1. Section twenty-two hundred and thirty-one of the code of civil procedure is hereby amended by inserting therein a new subdivision, to be subdivision one-a, to read as follows:

185 "1a. A public emergency existing, no proceeding as prescribed in subdivision one of this section shall be maintainable to recover the possession of real property in a city of a population of one million or more or in a city in a county adjoining such a city, occupied for dwelling purposes, except a proceeding to recover such possession upon the ground that the person is holding over and is objectionable, in which case the landlord shall establish to the satisfaction of the Court, that the person holding over is objectionable; or a proceeding where the owner of record of the building, being a natural person, seeks in good
186 faith to recover possession of the same or a room or rooms therein for the immediate and personal occupancy by himself and his family as a dwelling; or a proceeding where the petitioner shows to the satisfaction of the Court that he desires in good faith to recover premises for the purpose of demolishing the same with the intention of constructing a new building, plans for which new building shall have been duly filed and approved

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by the proper authority; or a proceeding to recover premises constituting a part of a building and land which has been in good faith sold to a corporation formed under a co-operative ownership plan whereof the entire stock shall be held by the stockholders in proportion to the number of rooms occupied or to be occupied by them in such building and all apartments or flats therein have been leased to stockholders of such corporation for their own personal, exclusive and permanent occupancy to begin immediately upon the termination of any tenancy of the apartments or flats leased by them existing on the date when 188 this subdivision takes effect.

"In a pending proceeding for the recovery of real property in such a city on the ground that the occupant holds over after the expiration of his term, a warrant shall not be issued unless the petitioner establishes to the satisfaction of the Court that the proceeding is one mentioned in the exceptions enumerated in this subdivision.

"This subdivision shall not apply to a new building in course of construction at the time this subdivision takes effect or commenced thereafter and be in effect only until the first day of 189 November, nineteen hundred and twenty-two.

"Sec. 2. This act shall take effect immediately."

Chapter 137, Laws of New York (enacted April, 1920).

"Section 1. Application. The provisions of this act shall apply only to a summary proceed-

190 ing in a city of the first class or in a city in a county adjoining a city of the first class to recover the possession of premises occupied for dwelling purposes, other than a room or rooms in a hotel, lodging house, or rooming house, upon the ground that the occupant is holding over and continuing in possession of the premises after the expiration of his term, without permission of the landlord, and shall govern such a proceeding notwithstanding the provisions of any general or special act inconsistent herewith. The relief hereby provided shall be in addition to relief provided by any
191 other act the provisions of which are not inconsistent herewith. This act being emergency legislation, its provisions shall be liberally construed to carry out the intent thereof.

"Sec. 2. Effect of petition. The presentation of a petition in such a proceeding to a Court, judge or justice having by law jurisdiction there of shall be an election by the landlord to terminate the tenancy which might otherwise arise by operation of law.

"Sec. 3. Discretionary stay. Where the final
192 order in such a proceeding establishes that the occupant is holding over and continuing in possession of the demised premises, after the expiration of his term, without the permission of the landlord, the Court, judge or justice making such order, on application of the occupant, may, in its or his discretion and subject to the conditions prescribed by this act, stay the issuance of a warrant and also stay any execution to collect the

costs of the proceeding, for such period, not more than twelve months, as the court, judge or justice, in its or his discretion, may deem proper. 193

"Sec. 4. Application for and granting of stay. Upon application of a stay, the court, judge or justice shall hear the parties, and if upon such hearing it appears that the premises described in the petition are used for dwelling purposes; that the applicant cannot secure suitable premises for himself and his family within the neighborhood similar to those occupied; that he has used due and reasonable effort to secure such other premises; that his application is made in good faith and that he will abide by and comply with the terms and provisions prescribed by the court, judge or justice; or that by reason of other facts such action will be warranted, the court, judge or justice may grant a stay as provided herein, on condition that the terms upon which such stay is granted be complied with. 194

"Sec. 5. Terms and conditions of granting and continuing stay. Such stay shall be granted and continue effective only upon the condition that the person against whom the final order is made shall make a deposit in court of the entire amount, or such installments thereof from time to time, as the court, judge or justice may direct, for the occupation of the premises for the period of the stay, at the rate to which he was liable as rent for the month immediately prior to the expiration of his term or tenancy, plus such additional amount, if any, as the court, judge or justice may determine to be reasonable; such deposit shall also include all rent unpaid prior to the period of 195

196 the stay. The amount of such deposit shall be determined by the court, judge or justice at the hearing upon the application for the stay, and such determination shall be final and conclusive in respect to the amount of such deposit, and the amount thereof shall be paid into court, in such manner and in such installments, if any, as the court, judge or justice may direct. A separate account shall be kept of the amount to the credit of each proceeding, and all such payments shall be deposited in a bank or trust company and shall be subject to the check of the clerk of the court,
197 if there be one, or otherwise of the court, judge, or justice.

"Sec. 6. Payment to the Landlord. The clerk of the court, if there be one, and otherwise the judge or justice, shall pay to the landlord or his duly authorized agent the amount of such deposit, in accordance with the terms of the stay, or the further order of the court.

"Sec. 7. Waiver of Act. Any provision of a lease whereby a lessee or tenant waives any provisions of this act shall be deemed against public policy and void.

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"Sec. 8. Effect. This act shall take effect immediately, and shall be in force until November 1, 1922."

Real Property Law. (Laws of 1909, Ch. 52.)

"Sec. 230. Liability of Tenant Holder Over After Receiving Notice to Quit. Where, on the

termination of an estate for life, or for years, the person entitled to the possession demands the same, and serves, in the same manner as for the termination of a tenancy at will, a written notice to quit, if the tenant, or any person in possession under him, or by collusion with him, wilfully holds over, after the expiration of thirty days from such service, he must pay to the person so kept out of possession, or his representatives, at the rate of double the yearly value of the property detained, for the time while he so detains the same, together with all damages incurred by the person so kept out by reason of such detention. There is no equitable defense or relief against a demand accrued, or a recovery had, under this section."

Chapter 138, Laws of New York (enacted April, 1920).

"Sec. 1. Section two hundred and thirty of chapter fifty-two of the laws of nineteen hundred and nine, entitled, 'An act relating to real property, constituting chapter fifty of the consolidated laws,' is hereby repealed.

"Sec. 2. This act shall take effect immediately."

Chapter 945, Laws of New York (enacted September, 1920).

"Sec. 1. Subdivision two-a of section twenty-two hundred and thirty-one of the code of civil procedure is hereby amended to read as follows:

Exhibit "A" Attached to Bill of Complaint.

202 "2a. No proceeding as prescribed in subdivision two of this section shall be maintainable to recover the possession of real property in a city of the first class or in a city in a county adjoining a city of the first class, occupied for dwelling purposes, unless the petitioner alleges in the petition and proves that the rent of the premises described in the petition is no greater than the amount for which the tenant was liable for the month preceding the default for which the proceeding is brought. Nothing in this subdivision shall preclude the tenant from interposing any
203 defense that he might otherwise have. The tenant may interpose the defense that the rent mentioned in the petition is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive, and if such defense be interposed, then the petitioner within five days after the filing of the answer or within such time as the court, judge or justice, upon a good cause shown may determine shall file with the clerk of the court a verified bill of particulars setting forth the gross income derived from the building of which the premises in question are the whole or a part; the number of apartments
204 in the building and the number of rooms in each apartment; and the number of stores in such building; the rent received for each such apartment or store for the period of one year last past; the consideration paid by the landlord for the building, if he be the owner thereof, or if he be a lessee the rent agreed to be paid by him; the assessed valuation of the property and the taxes for the current year; the annual interest charge

on any incumbrance paid by the landlord; the operating expenses with reasonable detail; and such other facts as the landlord claims affect his net income from such property. Issue shall not be deemed joined until the filing of such bill of particulars. Upon the petitioner's failure to file said bill of particulars within the time limited, the court, judge or justice upon motion of the defendant shall dismiss the proceeding. This subdivision shall not apply to a room or rooms in a hotel containing one hundred and twenty-five rooms or more, or a lodging house, or rooming house, occupied under a hiring of a week or less. This subdivision as amended shall not apply to a new building in course of construction at the time this amendment take effect or commenced thereafter and shall be in effect only the first day of November, nineteen hundred and twenty-two. 205 206

"Sec. 2. This act shall take effect immediately."

State of New York,

VERIFICATION:

County of New York,
City of New York—ss.: 207

LOUIS BROWN, being duly sworn, deposes and says that he is secretary of the complainant herein; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Verification, Attached to Bill of Complaint.

208 The reason why this verification is made by deponent is that he is an officer, to wit, the secretary of the complainant, which is a New Jersey corporation, and is familiar with the facts and circumstances herein.

LOUIS BROWN.

Sworn to before me this
17th day of November, 1920.

ISIDORE WECKSTEIN,
Notary Public,
209 Kings Co. Certified in N. Y. Co.

(Seal.)

Endorsed: Filed Dec. 16th, 1920.

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Answer.

211

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

MARCUS BROWN HOLDING COMPANY,
Complainant,

—against—

MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York, 212
Defendants.

Defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz, answering the petition of the complainant herein respectfully show to the Court and allege:

I. They deny that they have any knowledge or information thereof sufficient to form a belief thereof as to the truth of the allegation set forth at page 24 that the premises were on the date of the covenants referred to in the petition, of the reasonable market value of $1,175,000. 213

II. The defendants admit that heretofore and on the 27th day of June, 1917, an agreement of lease was entered into between the Marcus Brown Construction Company, Inc., and these defendants, wherein and whereby these defendants as ten-

214 ants, hired and the complainant let a seven room apartment known as apartment 92 in the premises No. 215 West 91st Street, in the Borough of Manhattan, City of New York, for a term of three years commencing on the first day of October, 1917, and terminating on the 30th day of September, 1920, to be occupied as a dwelling apartment by these defendants and their families, and these defendants agreed to pay the annual rental of the sum of $2,100. and upon other terms and conditions which are fully set forth in said instrument of lease, and your deponents beg leave to refer to the original thereof.

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III. Other than as hereinabove expressly admitted the defendants deny the allegations contained in the paragraphs of the petition set forth at folios 48, 49 of said petition.

IV. The defendants deny the allegations contained at folios 17 and 18 of said petition, to the effect that between the time when the said notice was given, on the 30th day of September, 1920, the said defendants by the exercise of ordinary diligence, could have obtained an apartment in the City of New York, to be used and occupied by

216 them on and after the said 1st day of October, 1920.

V. Defendants deny the allegations contained in folios 63, 64, 65, 66.

VI. Defendants have been advised by their counsel and verily believe that the acts of the

Legislature of the State of New York, referred to at folios 63, 64, 69 of said petition, to wit, Chapters 135, 947, 136, 944, 131, 951, 132, 133, 139, 948, 942, 137, 138, 945, 943, 946, 949, 950, 952 of the laws of 1920, passed by the Legislature of the State of New York, at a session thereon of April, 1920, and at an extraordinary session of September, 1920, are not in contravention of Article I, section 10 of the Constitution of the United States of America, and he therefore denies the allegations contained at folios 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 98 of the petition herein. 217 218

VII. Defendants deny knowledge or information thereof sufficient to form a belief as to the allegations contained at folios 79, 80, 81, 82, 83, of the petition herein.

VIII. Defendants deny the allegation contained at folio 84 of said petition, to the effect that the value of the use and occupation of the premises herein described and wrongfully used and occupied by the defendants, Marcus Feldman, Benjamin Schwartz and Frank Schwartz is in excess of $3,000. and upon information and belief denies that the matter in controversy is in excess of the sum of $3,000. exclusive of interest and costs. 219

IX. Defendants deny the allegations contained at folios 84, 85 of said petition.

X. These defendants further deny that your complainant can have no adequate relief except in this court.

220 AS AND BY WAY OF A FIRST SEPARATE AFFIRMATIVE DEFENSE THESE DEFENDANTS REPEAT AND REALLEGE ALL OF THE DENIALS HEREINBEFORE FULLY SET FORTH AND CONTINUE FURTHER ALLEGE:

XI. That in and by Chapter 942 of the Laws of 1920, which became a law on the 27th day of September, 1920, it was expressly provided:

"(AN ACT to amend the code of civil procedure, in relation to summary proceedings to recover the possession of real property in cities of a population of one million or more and in cities in a county adjoining such a city.)

221 Became a law of September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section twenty-two hundred and thirty-one of the code of civil procedure is hereby amended by inserting therein a new subdivision to be subdivision one-a, to read as follows:

1-a. A public emergency existing, no proceeding as prescribed in subdivision one
222 of this section shall be maintainable to recover the possession of real property in a city of a population of one million or more or in a city in a county adjoining such a city, occupied for dwelling purposes, except a proceeding to recover such possession upon the ground that the person is holding over and is objectionable, in which case the landlord shall establish to the satisfaction of the court, that the person

holding over is objectionable; or a proceeding where the owner of record of the building, being a natural person, seeks in good faith to recover possession of the same or a room or rooms therein for the immediate and personal occupancy by himself and his family as a dwelling; or a proceeding where the petitioner shows to the satisfaction of the court that he desires in good faith to recover premises for the purpose of demolishing the same with the intention of constructing a new building plans for which new building shall have been duly filed and approved by the proper authority; or a proceeding to recover premises constituting a part of a building and land which has been in good faith sold to a corporation formed under a co-operative ownership plan whereof the entire stock shall be held by the stockholders in proportion to the number of rooms occupied or to be occupied by them in such building and all apartments or flats therein have been leased to stockholders of such corporation for their own personal, exclusive and permanent occupancy to begin immediately upon the termination of any tenancy of the apartments or flats leased by them existing on the date when this subdivision takes effect. 223 224

In a pending proceeding for the recovery of real property in such a city on the ground that the occupancy holds over after the expiration of his term, a warrant shall not be issued unless the petitioner establishes to the satisfaction of the court that the proceeding is one mentioned in the exceptions enumerated in this subdivision. 225

This subdivision shall not apply to a new building in course of construction at

226 the time this subdivision takes effect or commenced thereafter and be in effect only until the first day of November, nineteen hundred and twenty-two."

XII. That by and by Chapter 947, of the laws of the State of New York, which became a law on the 27th day of September, 1920, it was further expressly provided:

"AN ACT to amend the code of civil procedure, in relation to actions to recover the possession of real property in certain cities and to repeal section fifteen hundred and thirty-one-a thereof.

227 Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article one of title one of Chapter fourteen of the code of civil procedure is hereby amended by adding at the end a new section, to be section fifteen hundred and thirty-one-a, to read as follows:

§1531-a. A public emergency existing, no action as prescribed in this article shall be maintainable to recover the possession of real property in a city of a population of

228 one million or more or in a city in a county adjoining such city occupied for dwelling purposes, except an action to recover such possession upon the ground that the person is holding over and is objectionable, in which case the landlord shall establish to the satisfaction of the court that the person holding over is objectionable; or an action where the owner of record of the building, being a natural person, seeks in

good faith to recover possession of the same or a room or rooms therein for the immediate and personal occupancy by himself and his family as a dwelling; or an action to recover premises for the purpose of demolishing the same with the intention of constructing a new building, plans of which new building shall have been duly filed and approved by the proper authority. 229

This section shall be in effect only until the first day of November, nineteen hundred and twenty-two.

§2. Section fifteen hundred and thirty-one-a of such code, as added by chapter one hundred and thirty-five of the laws of nineteen hundred and twenty, is hereby repealed. 230

§3. This act shall take effect immediately."

XIII. That this defendant is continuing in possession of said premises under and by virtue of the provisions of law hereinabove fully set forth, and has offered and is ready, able and willing at all times to pay a reasonable rental for the use and occupation of said premises, or any sum that may be determined by a court of competent jurisdiction. 231

AS AND BY WAY OF A SECOND, SEPARATE AFFIRMATIVE DEFENSE, THESE DEFENDANTS REPEAT ALL OF THE DENIALS HEREINBEFORE FULLY SET FORTH AND CONTINUING FURTHER ALLEGE:

XIV. That heretofore and on or about the 27th day of June, 1917, the defendants rented from the Marcus Brown Construction Co., Inc.,

232 the said apartment, consisting of seven rooms known as apartment No. 92 at the address No. 215 West 91st Street, in the Borough of Manhattan, City of New York, for a period of three years at an annual rental of $2,100. per annum upon the terms and conditions fully set forth in the original of said lease, which will be produced upon the trial hereof. That in or about the month of March, 1920, these defendants requested from the Marcus Brown Construction Company a renewal of the lease for the apartment occupied by them.

233 XV. That prior to the first day of October, 1920, the Marcus Brown Construction Company demanded of these defendants that they surrender the possession of the apartments occupied by them respectively, and that as to the defendant Benjamin Schwartz, the said company notified him that the company had leased the premises to other parties, from the 1st day of October, 1920.

XVI. That your defendants thereupon immediately began to make effort to secure an apartment at all suitable for his requirements, and
231 both these defendants and other members of defendants' households, sought about in repeated efforts, from day to day, in and about the city, to locate an apartment for even more than a reasonable rental, and more than the prevailing rental. That these defendants and those of their families who sought about in such effort, were unable to locate apartments, wherein they could be assured that they could have possession of

the premises by the 1st day of October, 1920. That while there were certain apartments for which leases could be signed, the rentals attempted to be exacted, were exorbitant, unjust and oppressive, and in each such instance the owner stated that he would not guarantee possession by the 1st day of October, as the premises were then occupied by tenants who were uncertain as to whether they would be able to secure other quarters, and that the landlords were uncertain as to whether said tenants would vacate by the 1st day of October. 235

XVII. These defendants were and continued at all times, ready, able and willing to pay an increased rental for the purposes of retaining the said premises. That these defendants were not accorded an opportunity by the landlord to discuss the matter of rental. 236

XVIII. That the defendants then informed the landlord that they were ready to pay a reasonable increase in the rental of said premises, if allowed to continue in possession, which said offer was refused.

XIX. That by reason of the foregoing, these defendants were compelled to and did continue in actual occupancy of the said premises, and now are in occupancy thereof, under the protection of the laws hereinabove fully referred to, and now are and at all times have been ready, able and willing to pay the fair and reasonable rental value of said premises, or any reasonable increase as the same may be determined by a court of competent jurisdiction. 237

238 XX. That these defendants verily believe that there is an emergency existing in the matter of housing in the City of New York, and that by reason thereof, landlords and owners of property, particularly dwellings in the residential districts of the City of New York, and more particularly in the populous districts thereof, are exacting and demanding unjust, unreasonable, exorbitant and excessive rentals under the duress of existing conditions. That such exactions are harsh and inequitable.

XXI. That these defendants respectfully state
239 that by this proceeding, this plaintiff is seeking to invoke the aid of a court of equity, for illegal unlawful exorbitant, unfair, unjust and unreasonable rentals, under duress of existing conditions. That this complainant does not desire the said premises for its own occupancy.

XXII. Upon information and belief, that the apartments in the premises occupied by the defendant are so held by the complainant, and his assignor for the purpose of renting, letting and hiring out to any person or persons, at a stipulated monthly or annual rental. That it is
240 not the intention of your complainant or of his assignor to demolish the said building for the purpose of erecting any new structure thereon, and that the sole purpose of ousting your defendants from the said premises, is to secure possession thereof in order to enable the landlord to exact, under duress of existing conditions, an exorbitant, unjust, unreasonable and inequitable rental, for the said premises.

AS AND BY WAY OF A THIRD, SEPARATE AFFIRMATIVE DEFENSE THESE DEFENDANTS REPEAT ALL OF THE DENIALS HEREINBEFORE FULLY SET FORTH AND CONTINUING FURTHER ALLEGE: 241

XXIII. The defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz, named in the above entitled suit, move that the bill be dismissed as against them, and assign the following grounds for the motion, namely, that the Bill of Complaint herein is exhibited by the plaintiff against the defendants, Marcus Feldman, Benjamin Schwartz and Frank Schwartz and Edward Swann as District Attorney, as defendants thereto, for several distinct matters and causes, in many of which these defendants are in no wise interested; and by reason of the joinder of such distinct and independent matters and the making of all of said parties defendants in the Bill, the Bill of Complaint is multifarious, and therefore the proceedings in this suit will be made unduly intricate and prolix, and these defendants will be put to unnecessary charges and expenses in matters which in no wise relate to or concern them. 242

WHEREFORE defendants demand judgment that the Bill of Complaint be dismissed with costs. 243

SAMUEL R. GERSTEIN,
Attorney for defendants,
Marcus Feldman, Benjamin
Schwartz and Frank Schwartz,
#299 Broadway,
Borough of Manhattan,
New York City.

DAVID L. PODELL,
Of Counsel.

Endorsed: Filed Dec. 16th, 1920.

Affidavit of Samuel R. Gerstein.

214 DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

MARCUS BROWN HOLDING COMPANY,
Complainant,

—against—

MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York
215 in the State of New York,
Defendants.

City and County of New York—ss.:

SAMUEL R. GERSTEIN, being duly sworn, deposes and says that he is the attorney for Marcus Feldman, Benjamin Schwartz and Frank Schwartz, defendants in the above mentioned action.

That on the 12th day of March, 1920, he was consulted by the defendants herein named, in
216 reference to a letter received by them from the Marcus Brown Construction Company, Inc., requesting that the defendants give up possession of their apartment on October 1st, 1920, and stated to your defendants that the said request was an answer to a letter in which the defendants had requested a renewal of their lease on said apartment.

That your deponent immediately stated to the 247
defendants that they should endeavor to find a suitable apartment, and if successful, to immediately notify the Marcus Brown Construction Company.

That your deponent and the defendants interviewed agents, with a view to obtaining a suitable apartment, but were unsuccessful, and on the 4th day of June, 1920, your deponent notified the Marcus Brown Construction Company, Inc., that his clients, the defendants in the above entitled action, were looking for and would continue to look for a suitable apartment, and if 248
successful, would give up possession of the apartment that they occupied, on October 1st, but that if unsuccessful, they were willing to pay a reasonable increase to be fixed by the landlord, and the tenant, or by the Mayor's Committee, and that if satisfactory arrangements could not be made between the said defendants and the Marcus Brown Construction Company, Inc., that then the defendants intended to apply to the Court for a stay of the warrant in any holdover proceeding which might be brought by the Marcus Brown Construction Company, Inc., on or after October 1st, 1920. 249

That thereafter the attorney for the Marcus Brown Construction Company, Inc., Joseph A. Seidman, Esq., wrote to your deponent and sent a copy of the letter to the defendant, in which he gave the addresses of a number of apartment houses, in which apartments might be found by the defendant. That your deponent and one of the defendants, Benjamin Schwartz, personally

250 visited at all of the addresses specified in the letter hereinbefore mentioned and that in every instance, the rental asked was over fifty per cent of what the defendants herein were paying for the apartment they occupied, and in some instances, were over one hundred per cent of the rent paid by them in the apartment that they occupied. In some of the places, possession of the apartments could not be guaranteed on the first of October, 1920.

That besides the addresses given to your deponent by the attorney for the Marcus Brown
251 Construction Company, Inc., your deponent and the defendants tried to obtain a suitable apartment in other localities.

That on July 14th, 1920, your deponent notified Joseph A. Seidman, Esq., the attorney for the Marcus Brown Construction Company, Inc., that he had investigated all of the addresses given, and that none of the apartments seen by the defendants were suitable because of the fact that the rental asked for said apartments were fifty and one hundred per cent higher than the rent that they were paying.

That in answer to said letter, the said Joseph
252 A. Seidman, Esq., informed your deponent that there was an apartment to lease in the premises adjoining those owned by the Marcus Brown Construction Company, Inc. That the said premises referred to did not contain an elevator and were therefore not suitable for the use of the defendants herein.

That your deponent informed the Marcus Brown Construction Company, Inc., and Joseph

A. Seidman, Esq., its attorney, that the defendants were at all times ready, able and willing to pay a reasonable increase to retain possession of said apartment that they occupied, and that the reason that they could not give up possession of same was that they could not, after a diligent search, obtain new quarters for themselves and families. 253

SAMUEL R. GERSTEIN.

Sworn to before me this
3rd day of December, 1920.

ROBERT J. BLUM,
Commissioner of Deeds,
Presiding in N. Y. Co. 254

Endorsed:
Filed December 16th, 1920.

In Equity—Motion to Dismiss Bill of Complaint.

256

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

MARCUS BROWN HOLDING COMPANY,
Complainant,

—against—

MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ and EDWARD SWANN, as
257 District Attorney of the County of New York in the State of New York,
Defendants.

NOW COMES the defendant, Edward Swann, District Attorney of the County of New York, and upon the bill of complaint herein moves that the said bill of complaint be dismissed for the following reasons and upon the following grounds, to wit:

1. That it does not appear upon the
258 face of the bill of complaint that the matter in controversy exceeds, exclusive of interests and costs, the sum or value of three thousand dollars, except by bare allegation to that effect, which allegation is not sustained or justified by any facts alleged in the bill of complaint.

2. That it appears upon the face of the bill of complaint that the facts stated are

insufficient to constitute a cause of action 259
in equity.

3. That it appears upon the face of the bill of complaint that the complainant has a plain, adequate and complete remedy at law.

4. That it does not appear upon the face of the bill of complaint and no sufficient facts are averred therein to show that the intervention of a court of equity or the assumption of jurisdiction by such a court is necessary or essential in order effectually to protect the property or rights 260
of property of the complainant from great and irreparable injury or from any injury whatever.

5. That if the bill of complaint were reframed under Section 274A of the Judicial Code and the cause permitted to proceed as an action of ejectment or other action at law, the defendant Edward Swann as District Attorney of the County of New York would not be either a proper party or a necessary party to such action, as no relief could be obtained against him 261
therein.

6. That each and all of the statutes referred to in the bill of complaint, including Chapter 951 of the Laws of 1920 (amending Section 2040 of the Penal Law) is a valid enactment passed by the Legislature of the State of New York in due exercise of its lawful and constitutional powers; and it does not appear upon

262 the face of the bill of complaint, or from the facts averred therein, that the said statutes, or any of them, or the enforcement thereof by the State of New York by and through its governmental and administrative agencies, operate or will operate to deprive the complainant of liberty or any property or rights of property without due process of law.

7. That it appears upon the face of the bill of complaint that to grant the relief sought by the complainant would constitute an unlawful and unconstitutional
263 interference by the agencies of the Federal Government with the lawful and constitutional power and right of the State of New York and its governmental agencies to prosecute violations of a criminal statute of the State of New York.

8. That it appears upon the face of the bill of complaint that this Court is without power or authority to grant the relief or to render the judgment and decree prayed for against the defendant Edward Swann as District Attorney of the
264 County of New York.

9. That no sufficient facts are alleged in the bill of complaint to warrant or justify the granting of the relief prayed for or any other relief, whether equitable or otherwise, either in equity or at law, against the defendant Edward Swann, as

Motion to Dismiss Bill of Complaint.

District Attorney of the County of New York. 265

WHEREFORE, for the reasons and upon the grounds aforesaid, the defendant, Edward Swann, District Attorney of the County of New York, moves this Court that the bill of complaint herein be dismissed as to him.

Dated, New York, November 23rd, 1920.

EDWARD SWANN,
District Attorney of the
County of New York. 266

ROBERT S. JOHNSTONE,
Solicitor for Defendant, Edward Swann, District Attorney of the County of New York.

Endorsed: Filed November 24th, 1920.

267

Opinion of District Court.

268

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

Before HOUGH, C. J.; MAYER and AUGUSTUS N. HAND, D. JJ.; holding the Court pursuant to Sec. 266, Judicial Code.

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269 MARCUS BROWN HOLDING COMPANY,
Plaintiff,

—against—

MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,
Defendants.

Hearing under order to show cause dated 18th November 1920, requiring the defendant Swann as
270 District Attorney to show cause why he should not be restrained *pendente lite* from instituting proceedings or actions of any kind against the plaintiff, its agents, etc., for failure or refusal to furnish heat, water, elevator service, etc., to the other defendants; also requiring the other defendants to show why they should not be restrained from "entering upon or continuing to occupy" the dwelling apartment described in the bill of com-

plaint herein, or make use of any property belonging to plaintiff without plaintiff's consent. 271

Plaintiff is a corporation of New Jersey; defendants, citizens of New York and residents of this District.

About 30th September, 1920, plaintiff became owner in fee of a large apartment house in this City, worth (as alleged) upwards of a million dollars.

When plaintiff acquired this building, defendants other than the District Attorney were tenants therein holding an apartment under a written lease made by plaintiff's predecessor in title on October 1, 1917, and terminating September 30, 1920; which lease contains the usual mutual covenants for quiet enjoyment and peaceable surrender. This plaintiff-landlord and its predecessors in title are in legal effect one legal entity. 272

In March, 1920, the landlord notified the tenant-defendants to surrender possession of the apartment in question at the expiration of their lease; in point of fact the landlord, before giving notice, executed a new lease, taking effect at the expiration of defendants' tenancy, to other parties, presumably more satisfactory to the lessor.

In June, 1920, the tenant-defendants advised the landlord that they were 273

> "willing to renew the lease of apartment in your premises at a reasonable increase to be determined by the Mayor's Committee."

This was rejected, the landlord writing that it expected the tenants to "surrender the premises on the expiration of lease as therein pro-

vided." At expiry the tenant-defendants refused to move; and having answered herein we assume the truth of their pleading alleging that they now are in occupancy of the apartment aforesaid under the protection of certain statutes of the State of New York, and

> "are and at all times have been ready, able and willing to pay the fair and reasonable increase as the same may be determined by a Court of competent jurisdiction."

Plaintiff insisting upon its right to choose its own tenants, brings this suit alleging the unconstitutionality of the statutes under which defendants justify retention of said apartment; which statutes are (as appears by the tenant-defendants' answer) Chapter 942 and 947 of the Laws of New York for 1920.

Plaintiff alleges as further violating its rights in the premises other statutes of New York, being Chapters 943-946 inclusive, and Chapters 948-952 inclusive, and Chapters 131, 132 and 135-138 inclusive of the laws of 1920.

Defendant Swann as District Attorney is sued because by Chapter 131 as amended by Chapter 951 there is added to the Penal Law of the State the declaration that any lessor, agent, janitor (or the like) of any building wherein lessees are, expressly or impliedly, entitled to hot or cold water, heat, light, power, elevator service, telephone or any other service or facility, who wilfully or intentionally fails to furnish the same, or who so "interferes with the quiet enjoyment of the leased premises by such occupant," is guilty of a misdemeanor.

The prayer as to the tenant-defendants is that 277
they be

> "enjoined and restrained from entering upon or continuing to occupy the apartment herein described or to make use of any of the property belonging to this complainant without this complainant's consent."

As to the District Attorney, the prayer is that he be enjoined from instituting any proceeding or action under the statute above alluded to or otherwise, for any failure or refusal on the part of the plaintiff to furnish the facilities above referred to to the tenant-defendants or "any other person occupying any part of the building" (belonging 278
to plaintiff) without "its consent or permission, and holding over against its will after October 1, 1920, under color of the statutes and laws" above referred to.

Hearing is on the bill, the answer of the tenant-defendants, the affidavit verified 17th November, 1920, of Mr. Joseph A. Seidman, attorney for plaintiff, the affidavit verified 3d December, 1920, of Mr. Samuel R. Gerstein, attorney for tenant-defendants, and certain public documents, viz.: "Reports of the Joint Legislative Committee on Housing," transmitted to the Legislature of New York on September 20, 1920, and the Message 279
(bearing the same date) of Governor Alfred E. Smith, relative to "Housing Facilities within the State, and Recommending Legislation in Reference Thereto."

It thus appears as a fact satisfactorily proven that the statutes above enumerated from Chapters 942-952 inclusive (commonly and collectively known as the September Housing Laws) were made laws for the reason and in response to the

280 demand or emergency insistently presented to the Legislature by the above mentioned report of its own Joint Committee and by the Governor's Message.

The other statutes complained of by plaintiff are collectively known as the "April Housing Laws." Assuming legislative power to enact all these laws, the April statutes have been almost wholly superseded by those of September. The importance of the earlier statutes, so far as this bill is concerned, seems to be that should the September acts be voided, argument might be made that the April acts were revived; hence
281 complaint is made of all the housing legislation of 1920.

Joseph A. Seidman, attorney and of counsel for plaintiff;

Messrs. Francis M. Scott, I. Maurice Wormser and Julius H. Zeiser filed, by permission, a brief as *amici curiae;*

Samuel R. Gerstein, attorney for tenant-defendants, with whom were William D. Guthrie and Julius Henry Cohen, Special Deputy Attorneys General of New York; and Elmer G. Sammis, Bernard Hershkopf, of counsel
282 for Joint Legislative Committee on Housing;

Robert S. Johnstone, solicitor for the District Attorney; John Caldwell Myers of counsel; and

David L. Podell, Benjamin S. Kirsh and Jacob Podell of counsel for tenants.

HOUGH, C. J.:

Several objections to plaintiff's right to be heard have been insisted on, and must be first considered.

The bill (it is said) sets forth several matters 283
of a distinct and independent nature against several defendants, and is therefore multifarious. In our opinion this is true, but it is also true that the 26th Supreme Court Rule in Equity has rendered that defense unavailable, whenever in the opinion of the Court "sufficient grounds appear for uniting the causes of action in order to permit the convenient administration of justice." The rule has been thus interpreted in this District since its promulgation; and see *Crawford* v. *Washington, etc., Co.*, 233 Fed. at 966; *Eclipse Co.* v. *Harley*, 244 Fed. 463; *United States* v. *New* 284
England, etc., Exchange, 258 Fed. 732.

The separate matters in this bill are two—one a complete severable cause of action against the District Attorney, the other (equally complete) against the tenant-defendants; yet plainly the constitutionality or the reverse of any action by the District Attorney depends wholly upon the constitutionality of these housing statutes. The rights of occupiers against landlords will, as to the services referred to in Chap. 951, depend upon the constitutionality of the statutes permitting them to remain where they are not wanted. Consequently the connection between the rights of 285
the tenant-defendants and those of the District Attorney is so intimate that both rights grow out of the same mass of legislation, and they should be tested together. This case affords a good example of the wisdom of abrogating the strict rule regarding multifarious pleading.

It is further said that the bill as affecting the tenant-defendants, is no more than an endeavor to

286 bring an ejectment suit in Equity. Such efforts have often been made and always failed (*Smyth v. New Orleans, etc., Co.,* 141 U. S. 656), and this bill suggests no circumstances under which this Court of Equity would be empowered to issue mandatory injunctions which would be the equivalents of writs of possession—yet this is the futile prayer of the bill.

But under modern procedure the dismissal of the bill does not necessarily follow. On the contrary, the Court is required by Act of March 3, 1915 (38 Stat. 956), to transfer any action
287 wrongly brought in Equity to the law side, and grant a repleader.

This plaintiff might, however, have brought an action for the recovery of possession of real property (ejectment) at law and in this Court. No state statute can define or limit the jurisdiction of this Court; and this is true, although it be assumed that the defenses in ejectment authorized by the statutes enumerated would be as available to defendants in the United States Courts sitting in New York, as they are in the tribunals of the state.

It is next objected that the bill cannot stand as
288 against the District Attorney; because the question must be raised after indictment, and in the criminal court. Considering the actual sequence of events in *Ex parte Young,* 209 U. S. 123; *Reich v. Truax,* 239 U. S. 33; *Wilson v. New,* 243 U. S. 332, and *Hammer v. Dagenhart,* 247 U. S. 251, courts of first instance may well refrain from much legal exposition.

It is true that the reasons assigned in some of these cases, for going into Equity, were in

substance that the party complaining would be injured in some constitutional right, by the operation of a statute alleged to be unconstitutional without ever being proceeded against himself; while in this instance plaintiff is personally subject to the operation of Chap. 951. 289

But the public documents above mentioned prove that the object of Chapter 951 is not to extend criminal liability to owners of apartment houses, for that was done in April by Chapter 131. The purpose is to make criminally liable substantially all of the landlord's servants or agents concerned in the operation of an apartment house; and the reason for this is that it had been found practically impossible to prove guilty knowledge on the landlord's part, wherefore conviction was impossible. 290

We do not understand that the Supreme Court has, in proceedings like this, barred from Equity *all* persons who may be pursued under a criminal statute, but only those who have under the statute a fair opportunity of raising the constitutional question in criminal proceedings brought directly against them. But in the cases which the legislature expected to produce by Chapter 951 this defendant would have no standing; yet if its agents are convicted, such conviction may obviously produce civil suits against the resultant liability on the part of this plaintiff. 291

Without attempting to define the limitations of bills in equity against officials charged with the administration of the criminal law, we think this suit is within the practice of the cases cited.

We therefore have before us two causes of action severally cognizable in this Court, though not in the same litigation; this is not because the

292 bill is multifarious, but because one cause of action is legal and the other equitable. We may shortly note here that the jurisdictional amount is well pleaded, which is enough for present purposes.

It is, however, plain that if the statutes affecting the rights of the plaintiff and the tenant-defendants are constitutional, plaintiff can no more succeed in an action of ejectment at law than it can under this bill in equity; and it is equally clear that if such statutes are constitutional the bill against the District Attorney should be dismissed. It is, therefore, an idle ceremony to
293 separate the causes of action and send one to the law side of the Court, and we shall now consider whether in any form of procedure on either side of the Court or against any defendant, plaintiff has revealed a cause of action.

Disregarding Chap. 948, which affects Buffalo and Rochester only, and speaking generally of the other September laws, the legislative intent is this: Within what may be called the Metropolitan district (New York City and contiguous counties) the owners of dwellings including apartment and tenement houses (but excepting buildings under
294 construction in September last, lodging houses for transients and the larger hotels) are wholly deprived until November 1, 1922, of all legal methods of removing from their premises the tenants or occupants of September, 1920, provided that such tenants or occupants are (in effect) ready, able and willing to pay a reasonable rent or price for their use and occupation. Whenever (the commonest case in this City) the tenancy was from month to month, any demanded rent

greater than that of a year prior to such demand 295
is presumptively unreasonable and oppressive. Whether the landlord attempts to recover the desired rent by personal action, or tries to get back his premises by dispossess proceedings or ejectment, a September occupant can always block him and remain in possession by bringing into Court a sum equivalent to the last month's rent, until the issue of reasonableness is passed on by Court and jury. The landlord's former legal rights are intact, however, when the occupant is "objectionable," when the demanding landlord is a "corporation formed under a cooperative ownership plan," and when the building is in good faith 296
required for the purpose of demolition and rebuilding or the personal occupancy of the owner.

A knowledge of pre-existing law and the words of the statutes are enough to prove that the legislative desire is to maintain for about two years the September status of the kind of dwellings in which (by common knowledge) lives the major portion of the population of the Metropolitan district. This status is to be maintained against the landlord's will if necessary but at the option of the tenants; for the landlord cannot select his tenants, but must accept what may be called 297
the statutory tenants; yet every such tenant is and will be as free to depart and choose another landlord as he was before September, 1920.

Finally, to prevent owners from rendering their apartments uncomfortable for, if not uninhabitable by, the unwelcome statutory occupants, any intentional diminution or denial of the ordinary facilities or conveniences of apartment house

298 life is made a misdemeanor on the part not only of the owner but substantially of every person connected with the management of the building, if intentional failure to furnish such facilities can be proven against him.

Speaking now specifically of the facts in the present case, the tenant-defendants herein, by law older than the State of New York, became at the landlord's option trespassers on October 1, 1920. Plaintiff has then found and made a contract with a tenant it liked better, and had done so before these statutes were enacted. By them plaintiff is, after defendants elected to remain in possession,
299 forbidden to carry out his bargain with the tenant he chose, the obligation of the covenant for peaceable surrender by defendants is impaired, and for the next two years Feldman, *et al.*, may if they like, remain in plaintiff's apartment, provided they make good month by month the allegation of their answer, *i. e.*, pay what "a Court of competent jurisdiction" regards as fair and reasonable compensation for such enforced use and occupancy; and meanwhile, if any person concerned in the management of the apartment house intentionally cuts off any of the facilities or con-
300 veniences appurtenant to apartment house life when Feldman and Schwartz were presumptively desired as tenants—a crime has been committed.

Since jurisdiction depends on diversity of citizenship, plaintiff is entitled to urge violations of the state as well as the federal constitution, but this Court will confine itself to the latter charter of rights; the construction of the state constitution having been exhaustively considered

by the courts of the state in contemporaneous and 301
similar litigation.

It is asserted that by these statutes the obligations of plaintiff's contracts have been impaired, and so have those of a great number of other landlords. This is plainly true—the interpretation of Sec. 10 of Art. 1 of the Constitution made in *Green* v. *Biddle*, 8 Wh. 1, has never been departed from.

Further assertion is that plaintiff and other landlords similarly situated have been denied the equal protection of the laws, in that the owners of finished, and presumably occupied dwellings 302
have been chosen for legislative oppression, when no such burdens have been laid on owners of dwellings as yet unfinished or hereafter to be erected, nor upon those possessed of office and business property, hotels and the like—who use their real estate for purposes of profit in the same manner and to the same extent as do the dwelling-house landlords.

It has been often said that the equal protection of the laws mentioned in the Fourteenth Amendment means a pledge of the protection of equal laws, and more specifically that every state shall give equal protection and security to all 303
under like circumstances, to the end that no greater burdens shall be laid upon one than are laid upon others in the same calling and condition (*Barbier* v. *Connolly*, 113 U. S. 27). But it is also fundamental that such equality is not as matter of law inconsistent with classification both for benefits and burdens, and exactly how that classification may be made, has never been defined and we think never ought to be, having regard to

304 the infinitely changing circumstances of human society. When by classification or otherwise we arrive at "a partial or private law which directly proposes to destroy or affect individual right", it is "unconstitutional and void", for "were it otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law, by another" (*Cotting v. Kansas City, etc., Co.*, 183 U. S. at 105). While a forbidden result may be thus denounced, well founded uncertainty as to means has produced the ruling that "what may be regarded as a denial of the equal protection of the
305 laws is a question not easily determined, • • • no rule can be formulated that will cover every case" and the highest court has gone no further in the way of definition than to say that no class of persons shall be denied the same protection enjoyed by "other classes in the same place, and *in like circumstances*" (*Connolly v. Union, etc., Co.*, 184 U. S. at 558). The phrase "in like circumstances" leaves open a question newly presented in each new case.

Again it is said that these statutes put an end to liberty of contract and take property for a
306 private use, and therefore in both respects amount to a denial of due process of law. That as to one, and a very large fraction of the contractual engagements current in this city, there is no liberty of contract under these statutes cannot be denied; and that property is taken from the landlord for the use of the statutory tenant is also true, in the sense that the property owner may be, and is in this instance compelled to let his property be enjoyed by one whom he does not

want; and it may be true in another sense although the statutory-tenant be a person entirely satisfactory except in the amount of rent he pays —if there be any legal difference between what the landlord could get in the open market for his property and that reasonable rent for the fixing and recovery of which the state still affords legal machinery. 307

But when appeal is made to the due process clause of the Fourteenth Amendment, it must always be remembered that so far as the national Constitution is concerned the phrase has never been authoritatively and finally delimited or defined—definition has been declined, because it is better to ascertain meaning in each case by a process of judicial inclusion and exclusion (*Davidson* v. *New Orleans*, 96 U. S. at 104). 308

It is a wearisome truism that any legislative act is presumptively constitutional; it is also true that in popular, if not in professional estimation the presumption weakens in proportion to the novelty or singularity of the statute. No legislation really like that at bar has been discovered in American history by the research of counsel, and the nearest (and not very near) instances known to us are the stay and collection laws of many states (notably Kentucky) in the early days of the last century, and the limitations upon the private use of real property considered in *Welch* v. *Swasey*, 214 U. S. 91. 309

But no matter how astonishing the legislation appears to the citizen, it has been so many times said that the wisdom, expediency or sincerity of the legislature is not open to judicial inquiry, that citation is superfluous. Judicial review is,

310 and always has been, properly limited to an inquiry into the *reason* for the ascertained legislative intention—starting with the premise that the mere "say so" of the legislature does not furnish a reason by its mere existence.

This inquiry has led courts very far, and it is doubtless true that reasons have of late years been judicially considered concerning which previous generations were not asked to inquire, and would have perhaps deemed the inquiry superfluous, if not improper. How wide this investigation has become, and how rapidly its scope has
311 enlarged, can be seen by comparing not only the decisions but especially the briefs and records in *Lochner* v. *New York*, 198 U. S. 45, with those in *Muller* v. *Oregon*, 208 U. S. 412.

The reason for the laws here involved is patent from the public documents above mentioned; no appeal need be made to common knowledge or contemporary observation.

In October last the Municipal Courts of New York City were flooded with more "Notices to quit", *i. e.*, summary dispossess proceedings, than had ever before been known during an entire year. They amounted to a hundred thousand,
312 and according to the estimate of families commonly used by local relief associations and other statisticians, the number of persons involved in each dispossess proceeding was not less than four, and in all probability five. This meant that nearly ten per cent. of the permanent population of the city would (if existing laws took their course) shortly be seeking other habitations on the eve of winter.

The demands of a world at war had for several 313
years produced such application of men, money and material to other and more immediately lucrative occupations, that new dwellings in the City of New York and adjacent territory were conspicuously absent, while the same attractions that had practically stopped building, had increased the home-seeking population of the city to an extent unstated but certainly large.

This almost total absence of new homes produced a demand for the old out of proportion to the supply; such demand raised the market value of the old, and correspondingly diminished economic equality, or equality in bargaining between any actual landlord and any would-be tenant, either new or old. Such conditions produced a reason, deemed sufficient by the legislature, to prefer in the struggle for living space the tenants in possession to all others, and to them was given the option of remaining at a reasonable rent, so-called; really a statutory charge for use and occupation; but there was secured to the landlord a legal machinery for ascertaining such reasonable compensation. 314

As matter of law we cannot hold that the market value, or price, *i. e.*, what is fetched when goods are bought and sold in the *ordinary* course of trade—*Muser* v. *Magone*, 155 U. S. 240—is for the use of real property anything different from that reasonable rent or use—charge secured to the landlord by these statutes. We have nothing before us but the statute—no accusation is made that those charged with adjusting rent are rendering the acts unconstitutional by their practical 315

316 interpretation of their duties thereunder. We therefore drop from further consideration the second part of plaintiff's argument regarding the taking of his property for private use. This does not, however, affect the asserted constitutional right to "choose his own tenant."

Thus we think it reached the only inquiry open to a Court: is the reason assignable for the housing laws constitutionally sufficient to overcome the constitutional objections presented?

It cannot be too often said that a constitution is not a code, nor a statute; and that it declares only fundamental principles and is not "to be
317 interpreted with the strictness of a private contract" (Legal Tender Cases, 110 U. S. 421). To this doctrine we owe the rulings that even the contract clause of the Constitution does not override the power of the state to establish regulations *reasonably necessary* to secure the health, comfort or general welfare of the community—that is, to exercise the police power of the state (*Atlantic, etc.* v. *Goldsboro*, 232 U. S. 548); that in like manner "reasonable restraints" may be placed upon freedom of contract (*Rail & River Co.* v. *Ohio, etc., Commission*, 236 U. S. 338);
318 and that a legislature may make police regulations although they interfere with the full enjoyment of private property and no compensation be given (*Chicago, etc., Co.* v. *Drainage Commission*, 200 U. S. 561).

Such decision (and we cite but few of many) reduce the question to this—are these statutes an exercise of police power reasonably suitable for combatting or lessening the evil proved—and therefore constitutional, although at other times

and under other circumstances they might plainly 319
be obnoxious to fundamental principles of constitutional government.

In brief something is said to the effect that the statutes are justified because consonant with the state's "public policy." The assertion gets nowhere—for it is firmly established that no state can have a public policy except what is to be found in its constitution and its laws constitutionally enacted (*People* v. *Hawkins*, 157 N. Y. at 12). This case stands or falls on police power.

Definition of this phrase has never advanced over Chief Justice Taney's declaration that it is 320
no more than the power inherent in a sovereign (License Cases, 5 How. at 583). Applied to a state, this means its reserved sovereignty, inherent and incapable of being bartered away because necessary for the state's existence; and lessened only by what the people of the state joined with all the other people of the other states, in conveying to and consolidating in the United States.

On reason then, if a given subject matter is appropriate to the exercise of sovereign action, and such action has not been expressly and absolutely prohibited by the Federal Constitution as authoritatively construed, the legislative result is 321
not forbidden, where the purpose is within the range of reserved sovereignty, the means appropriate, and the reason sufficient; even though in reaching the result some toes be trodden on; and how many toes, and how severely they may be trampled, is a question that varies with circumstances.

We may inquire therefore whether the subject

322 matter of these statutes is historically appropriate for legislative regulation. While rarely if ever exercised in America, there can be no doubt that one of the oldest exercises of sovereignty has been to fix the price and use of some of the necessities of life, especially bread. Shelter is as much a necessity as bread, and that likewise has in times of stress been the subject of regulation, and indeed of apportionment (Freund on Police Power, Sec. 308).

There have been, however, since the dawn of our legal history, some occupations closely allied with the necessities of life, which have always
323 been governmentally regulated, both as to prices chargeable and persons to be served. The usual examples are inn-keepers, carriers, millers, ferrymen and wharfingers. At common law the property of these men was held to be devoted to a public use, and their occupations were public businesses (*State* v. *Edwards*, 86 Me. 102).

From this ancient doctrine grew the famous series of "elevator cases"—*Munn* v. *Illinois*, 104 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *North Dakota*, 153 U. S. 391. In and by these decisions, the doctrine of *property devoted*
324 to a public use, became the doctrine of property *affected* with a public use, even when (as in the North Dakota case) the elevator owner really wished to and actually did confine his storage facilities to grain he had himself bought and desired himself to sell again. (Confer dissenting opinion of Brewer, J.)

The step from *property affected* with a public *use to a* "business affected by a public interest"

(*i. e.*, fire insurance) was taken in *German Alliance, etc., Co.* v. *Kansas*, 233 U. S. 389; and it must be now accepted on that authority as an "underlying principle that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation." 325

Since this pronouncement, and its legitimate and logical sequel, the "trading-stamp" case (*Rast* v. *Van Deman*, 240 U. S. 342), it may be and has been asserted that any business is affected with a public interest as soon as the electorate become sufficiently interested in it, to pass a regulatory statute. It is not necessary to go so far, but we must and do hold that the business of renting out living space, is quite as suitable for statutory regulation, and as much affected with a public interest, as fire insurance and trading stamps. 326

It is easy to multiply quotations as to the inviolability of private business. It is singular how uniformly they come from decisions holding some business open to intimate regulation, while saying that if such business were only private, it could not be regulated; but never is "private business" defined; it is another of those phrases which is left to a process of "inclusion and exclusion," which really means a finding of facts. Thus when *Budd* v. *New York* passed through the Court of Appeals in this state (117 N. Y. 1), Judge Andrews declared "that no general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services or interfere with freedom of contract, we cannot doubt." Similarly and very lately it 327

328 was said in *Producers, etc., Co.* v. *Railroad Commission*, 251 U. S. 228, "It is of course true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, that is, to carrying for the public, the state could not by mere legislative fiat * * * convert it into a public utility and make its owner a common carrier." That applicant had done just what the present plaintiff wants to do, selected its own customers, but it was regulated into taking customers it did not want, and so was Mr. Budd's elevator.

329 If, therefore, the allotment of necessaries in times of stress is a governmental function known to historic law, and the business now affected is (in such circumstances) one capable of being affected with a public interest, nothing remains of plaintiff's contention except the complaint of inequality in legal protection, *i. e.*, of classification.

This is the nub of the matter, for it is plain that a reason must be clear, which justifies on fundamental *i. e.* constitutional principles, the selection of one class of landlords for regulation, and one class of tenants for favor and protection.

330 The reason is clear; in property other than dwellings there was not, or there was not shown to be, such scarcity as existed in respect of livable rooms and apartments; the consequences of a scramble for stores or offices are not of the same deteriorating social character as is one for homes; men and women who want a place to sleep are peculiarly at the mercy of landlords, and

that inequality in bargaining recognized in *Holden* 331
v. Hardy, 169 U. S. 366, as a proper reason for regulation was present; and new buildings would certainly cost very much more than had the old ones, wherefore if price regulation or limitation as to them was attempted in advance of completion at unknown cost,—it would probably prevent exactly what was necessary to relieve the shortage that occasioned the evil to be combatted.

If the power of classification by legislatures was ever judicially limited, the effort has been abandoned, unless some limitation can be found in the statement that a distinction is arbitrary 332
where no "state of facts reasonably can be conceived that would sustain it" (*Rast* v. *Van Deman, supra*). No such rule, if it be a rule, finds application here.

It is unnecessary to further parade decisions; from the Slaughter House Cases (16 Wall., 36), to that of the Producers Co. (*supra*) at the last term of Court, all the Fourteenth Amendment decisions are alike in refusing dogmatic definition, and avoiding production of results by an inexorable legal logic; much, indeed most has been left to circumstances as they arose, so that reported cases are not so much precedents of law, 333
as instructive and illustrative historical incidents; the effort has been to apply a sort of "rule of reason" to eternally changing facts.

Having examined the reason for these laws to the best of our ability, we hold it shown that an emergency existed, and that the resultant evil threatened to spread; that the legislative remedy is of a kind long known to the law, though not hitherto used in America, that the business af-

334 fected is one capable of "superinducing the right of public regulation," that the reason assignable for such regulation as embodied in the statutes challenged at bar, is the kind of reason justifying this kind of statutes, and it being sufficient in kind we are not, and as a court cannot be concerned with its sufficiency in degree.

We speak only in the present tense; and hold the statutes complained of to be constitutional; but it does not necessarily follow that because they violated no fundamental law in September or December, 1920,—they will never so violate. Should it be shown hereafter that the reason for
335 the laws had in fact passed, questions may arise not now before us, and as to which we do not wish to seem to foreclose discussion.

It appearing that no ground exists for either suit in equity or action at law, it is ORDERED: That the bill be dismissed, without prejudice and without costs.

Mayer, and A. N. Hand, D. JJ., concur.

December 15, 1920.

336 Endorsed: Filed Dec. 16th, 1920.

Assignment of Errors.

337

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

MARCUS BROWN HOLDING COMPANY,
Complainant,

—against—

MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,

338

Defendants.

Comes now the complainant and files the following Assignment of Errors upon which it relies for its appeal from the decree made by this Honorable Court on the 23rd day of December, 1920; in the above-entitled action dismissing the complainant's bill and denying to it the relief prayed for:

1. In dismissing the said suit and entering a final decree therein in favor of the said defendants.

339

2. In not making, rendering and entering a decree in favor of the said complainant and against the said defendants adjudging that the defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz are continuous trespassers upon the property of the complainant; that their possession, by virtue of the laws enacted at the extraordinary session of the State Legislature of the State of New York known as Chapters 942,

340 913, 914, 915, 916, 917, 918, 919, 930, 931 and 932 of the Laws of 1920, and the laws enacted in April, 1920, known as Chapters 131, 132, 135, 136, 137 and 138 of the Laws of 1920, is unlawful and that the said laws so enacted by the Legislature of the State of New York at the said extraordinary session and in April, 1920, are in direct contravention and in violation of the Constitution of the United States of America, and in violation of the Civil Rights Act of the United States known as Sections 3925 and 3932 of the United States Compiled Statutes (1918), and in contra-
341 vention of the Constitution of the State of New York and in excess of the powers of the Legislature of the State of New York.

3. In not making, entering and rendering a decree in favor of the said complainant and against the said defendant Edward Swann, as District Attorney of the County of New York in the State of New York, adjudging that section 2010 of the Penal Law of the State of New York is unconstitutional and in contravention and in violation of the Constitution of the United States of America.

342 4. In not making, rendering and entering a decree in favor of the said complainant and against the defendants adjudging that the said complainant has no adequate remedy at law in this Court, and that it is entitled to equitable relief by injunction as prayed for in the bill of complaint.

5. In holding and deciding that the legislation enacted by the Legislature of the State of New

York during the year 1920, known as Chapters 343
131, 132, 135, 136, 137, 138, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951 and 952 of the Laws of 1920, was a proper exercise of the police power of the State and not contrary to and in contravention of the provisions of the Constitution of the United States of America and of the Constitution of the State of New York.

In order that the foregoing assignments of errors may be and appear of record, the complainant presents the same to the Court, and prays that such disposition be made thereof as in accordance with the law and the statutes of the United States in such cases provided, and com- 344
plainant prays for a reversal of the decretal order and decree of dismissal made and entered by said Court.

JOSEPH A. SEIDMAN,
Attorney & Solicitor for Complainant,
Office & P. O. Address,
No. 63 Park Row,
Borough of Manhattan,
City of New York.

Endorsed: Filed December 23rd, 1920.

EDWARD SWANN, Defendant, 345
District Attorney of the County of New York,
State of New York;

SAMUEL R. GERSTEIN,
Attorney for Defendants Marcus Feldman,
Benjamin Schwartz, Frank Schwartz;

MARCUS FELDMAN,
BENJAMIN SCHWARTZ,
FRANK SCHWARTZ.

316 **Stipulation as to Record.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

MARCUS BROWN HOLDING COMPANY,
Plaintiff,

—against—

317 MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,
Defendants.

IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated

348 JOSEPH A. SEIDMAN,
Solicitor for Complainant,

ROBERT S. JOHNSTONE,
Solicitor for Defendant,
Edward Swann as Dist. Atty.

SAMUEL GERSTEIN &
DAVID L. PODELL,
Solicitors for Defendants,
Feldman, Schwartz & Schwartz.

Clerk's Certification of Record.

DISTRICT COURT OF THE UNITED STATES, 349
SOUTHERN DISTRICT OF NEW YORK.

MARCUS BROWN HOLDING COMPANY,
Plaintiff.

—against—

MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,
Defendants. 350

I, ALEXANDER GILCHRIST, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of February in the year of our Lord one thousand nine hundred and twenty-one, and of the Independence o fthe said United States the one hundred and forty-fifth. 351

ALEXANDER GILCHRIST, Jr.,
Clerk.

Office Supreme Court, U. S.
FILED
FEB 28 1921
JAMES D. MAHER,
CLERK

Supreme Court of the United States.

OCTOBER TERM—No. 731.

MARCUS BROWN HOLDING CO., INC.,
Plaintiff-Appellant.

—against—

MARCUS FELDMAN, BENJAMIN SCHWARTZ, FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S BRIEF ON THE CONSTRUCTION OF THE CONSTITUTION AFFECTING THE VALIDITY OF THE HOUSING LEGISLATION ENACTED BY THE NEW YORK LEGISLATURE.

JOSEPH A. SEIDMAN,
Attorney for Plaintiff-Appellant.

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Supreme Court of the United States.

OCTOBER TERM—No. 731.

MARCUS BROWN HOLDING CO., INC.,
Plaintiff-Appellant.

—against—

MARCUS FELDMAN, BENJAMIN SCHWARTZ, FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S BRIEF ON THE CONSTRUCTION OF THE CONSTITUTION AFFECTING THE VALIDITY OF THE HOUSING LEGISLATION ENACTED BY THE NEW YORK LEGISLATURE.

The appeal in the case at bar presents for review a final decree of the District Court of the United States for the Southern District of New York dismissing plaintiff's bill of complaint and denying the motion for an injunction.

Briefly stated, this appeal presents for adjudication the validity and constitutionality of the housing legislation enacted by the New York State Legislature at its regular and extraordin-

ary sessions in 1920 (Chapters 131 to 138 and Chapters 942 to 952, inclusive).

Diversity of citizenship is assigned as one of the grounds of jurisdiction, which entitles the plaintiff to urge violation of the State Constitution as well as the violation of the Federal Constitution.

The construction of the New York State Constitution in so far as it affects the validity of Chapter 947 suspending the right to recover possession of real estate by ejectment has been considered by the Appellate Division of the Supreme Court of the State of New York, First Department, in the case of *Jacob L. Guttag* v. *Hyman Shatzkin*, decided December 24, 1920 (N. Y. Law Journal, Dec. 28, 1920), and it was held that this Statute is void and unconstitutional, as unlawfully usurping the jurisdiction of the Supreme Court, impairing obligations of contract, and taking away property without due process of law.

Chapter 944 limiting the landlord to a "reasonable rent" was passed upon by the same Court and by a divided Court this statute was held constitutional.

Chapter 942, suspending the right to maintain summary proceedings—a statutory remedy for the

recovery of possession of real property—was passed upon by the Appellate Division of the New York Supreme Court, Second Department, in *People, etc., ex rel. Rayland Realty Co.* v. *Fagan* (194 N. Y. App. Div., 185), the majority of the justices of that Court holding this statute to be constitutionally valid. The Court of Appeals of the State of New York has now under consideration the same cases, which have been appealed from the Appellate Division.

The validity of Chapter 131 as amended by Chapter 951, which declares a wilful refusal to render services to a lessee under a lease, *express or implied*, to be a misdemeanor, subjecting the lessor, his agent, manager, superintendent and janitor to penalties, has not as yet been construed by the State courts.

The legislation under consideration is more drastic and revolutionary than even the "Ball Rent Law" (41 U. S. St. L. 298), construed by the Court of Appeals of the District of Columbia in *Hirsh* v. *Block*, 267 Fed. Rep. 614, now under review by this Court.

The importance of the questions before this Court and the far-reaching effects of an affirmance of the constitutional validity of this legislation seems to render it imperative that there

should be a fuller discussion than would perhaps otherwise be deemed necessary.

The New York Legislature has, in effect, asserted a power to take away all control of their property from the owners of existing buildings occupied for dwelling purposes. It has, in effect, decreed that all such property is under State control; the occupants—mere trespassers—are permitted (Chs. 942, 945 and 947) to remain in possession against the will of the owners; the police and prosecuting officers are told (Ch. 951) to protect these "*statutory tenants*" in their possession; "*freedom of contract*" between landlord and tenant is abolished (Ch. 136 and Ch. 944); that the terms of their relationship are fixed not by economic law, but by discretion of officials (Chs. 944, 945); leases voluntarily entered into are nullified; the burden of proof as to the reasonableness of the rent fixed by mutual agreement voluntarily made is cast upon the land owner; the value of the property is depressed, if not destroyed; and, finally the property is taken from the owner without any legal process and given to and for the benefit and private use of the "*statutory tenant,*" leaving the latter free to vacate at any time during the statutory period of two years, while at the same time compelling the owner not to interfere with the quiet enjoy-

ment of the "statutory tenant" until November 1, 1922. Moreover, every lease made prior to September 27, 1920 (when these laws were enacted), and which was to become operative on and after October 1st, 1920, is by these laws completely destroyed; the performance of all such leases on the part of the lessors is made impossible; the performance by the lessees of their obligations to pay rent reserved is done away with; the obligation to surrender possession on termination of the lease is nullified; all without providing for some security to the owners for losses in rents in case the "statutory tenant" should deem it advisable to vacate before November 1, 1922.

The excuse for this extraordinary legislation is an alleged emergency—a shortage of buildings—and as proof of the existence of such emergency we are referred to public documents prepared by committees, etc. The accuracy of these reports has been successfully challenged by the plaintiff-appellant, who showed in its affidavits in support of the motion that the defendants who are holding over as "statutory tenants" could have by the exercise of ordinary diligence obtained possession of any one of a number of apartments in buildings in the immediate vicinity of plaintiff's building which were at the time unoccupied and offered to let.

The defendants admit this to be true, but they say that none of the apartments in these many buildings were "suitable" because one building was not equipped with an elevator, and where elevator service was furnished, the owners demanded rent which was from 50 to 100 per cent in excess of the rent paid by them to the plaintiff under a lease made in 1917 (see affidavit of Samuel R. Gerstein, record, pp. 83, 84).

ASSIGNMENT OF ERRORS.

The plaintiff assigns the following as errors:

1. In dismissing the said suit and entering a final decree therein in favor of the said defendants.

2. In not making, rendering and entering a decree in favor of the said complainant and against the said defendants adjudging that the defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz are continuous trespassers upon the property of the complainant; that their possession, by virtue of the laws enacted at the extraordinary session of the State Legislature of the State of New York known as Chapters 942, 943, 944, 945, 946, 947, 948, 949, 950, 951 and 952 of the Laws of 1920, and the laws enacted in

April, 1920, known as Chapters 131, 132, 135, 136, 137 and 138 of the Laws of 1920, is unlawful and that the said laws so enacted by the Legislature of the State of New York at the said extraordinary session and in April, 1920, are in direct contravention and in violation of the Constitution of the United States of America, and in violation of the Civil Rights Act of the United States known as Sections 3925 and 3932 of the United States Compiled Statutes (1918), and in contravention of the Constitution of the State of New York and in excess of the powers of the Legislature of the State of New York.

3. In not making, entering and rendering a decree in favor of the said complainant and against the said defendant Edward Swann, as District Attorney of the County of New York in the State of New York, adjudging that Section 2040 of the Penal Law of the State of New York is unconstitutional and in contravention and in violation of the Constitution of the United States of America.

4. In not making, rendering and entering a decree in favor of the said complainant and against the defendants adjudging that the said complainant has no adequate remedy at law in

this Court, and that it is entitled to equitable relief by injunction as prayed for in the bill of complaint.

3. In holding and deciding that the legislation enacted by the Legislature of the State of New York during the year 1920, known as Chapters 131, 132, 135, 136, 137, 138, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951 and 952 of the Laws of 1920, was a proper exercise of the police power of the State and not contrary to and in contravention of the provisions of the Constitution of the United States of America and of the Constitution of the State of New York.

THE UNDISPUTED FACTS.

The plaintiff, a New Jersey corporation, is the owner of a thirteen story modern elevator apartment house situated at No. 215 West 91st Street, in the Borough of Manhattan, City of New York, which contains eighty-four different apartments.

The reasonable market value of the said property is $1,175,000.

This property was acquired by the plaintiff under a deed of conveyance made by another corporation and by virtue of said deed the plaintiff succeeded to all of the rights, title and inter-

est of its grantor, and immediately upon such conveyance being made, a relation of landlord and tenant became established between the plaintiff and the defendants Schwartz and Feldman without attornment. (New York Real Property Law, 1909, Chap. 512, Section 248; *Moffatt* v. *Smith*, 4 N. Y. 126.)

The defendants Schwartz and Feldman came into possession of an apartment in the said building under and by virtue of a lease made by the plaintiff's predecessor in title, which by its terms expired on September 30th, 1920, at midnight; this possession of the said defendant tenants was the plaintiff's possession as landlord and not hostile or adverse to it, and under the law in force in New York at the time when this suit was commenced the said tenants could not deny the plaintiff's title to said premises (*Bedlow* v. *New York Floating Dry Dock Co.*, 112 N. Y. 263).

About seven months prior to the expiration of the lease under which the said defendants Schwartz and Feldman came into possession of said premises the plaintiff's grantor entered into a lease with one Goldsmith, whereby it leased the same apartment occupied by the defendants Schwartz and Feldman and agreed to deliver the possession thereof on October 1st, 1920.

The rights and obligations created by the said

two leases were assigned to and assumed by the plaintiff. Immediately after the enactment of the housing legislation in April, 1920, the said defendants Schwartz and Feldman gave notice to their said lessor that should any summary proceedings be instituted for the recovery of the apartment which they then occupied, that they would by virtue of the statutes so enacted demand an indefinite stay on the warrant that might be issued in such proceedings, and thereupon said defendants were notified that the conditions prescribed by the said statute authorizing the granting of such stay did not exist; that numerous apartments were to let in the immediate vicinity of said premises which said defendants, by the exercise of ordinary diligence, could obtain by entering into an agreement with any one of the owners of the buildings in which said apartments were to let; that the premises had been let to another party, and that the premises would have to be vacated by October 1st, 1920.

The defendants, however, insisted that the new laws enacted during the extraordinary session of the State Legislature in September, 1920, imposed an obligation upon the owner to retain them as its tenants after October 1st, 1920, and thereupon the said defendants refused to vacate the said premises, which prevented the plaintiff from

delivering possession of said apartment to the said Goldsmith in accordance with the terms of the lease made and entered into seven months before said lease went into effect and long prior to the time when rent legislation was in contemplation.

The plaintiff shows by its bill of complaint that the Legislature of the State of New York, for the purpose of enforcing this obligation imposed by statute upon owners of property whose premises are occupied by persons holding over, made it a penal offense for the owner, his agents and servants to in any way interfere with the use and enjoyment of the owner's property by persons holding over, or to deny to such persons holding over the benefits which they were entitled to receive under and by virtue of any lease, express or implied, even though such lease by its terms expired by express limitation; that this penal statute subjects the plaintiff, its officers and agents to severe and many penalties, and that such legislation is repugnant to the constitutional limitations created by the Constitution of the United States and is in violation of the Civil Rights Act and the Acts of Congress prohibiting the deprivation or infringement, under the color of State statutes, of the equal rights secured by the Constitution to the citizens of the United States.

LAWS OF NEW YORK GOVERNING THE RELATION OF LANDLORD AND TENANT IN FORCE WHEN THE LEASES MENTIONED IN THE BILL OF COMPLAINT WERE ENTERED INTO.

Under the common law in force at the time when the leases mentioned in the bill of complaint were made it was the duty of every tenant of an estate for years to surrender possession of the demised premises on the expiration of the lease. Holding over against the will of the owner was a trespass (*Barson* v. *Mulligan*, 198 N. Y. 23, 25; *Adams* v. *City of Cohoes*, 127 N. Y. 175, 182; *Phelan* v. *Kennedy*, 185 N. Y. App. Div. 749). The owner was entitled to recover as against the tenant holding over the possession of the premises demised even after the owner had executed a lease demising the same premises to another, because as was said by the New York Court of Appeals in *Eells* v. *Morse* (208 N. Y. 103, 106):

> "He, the landlord, has the right of possession as against the tenant holding over (*Whiting* v. *Edmunds*, 91 N. Y. 309) and the tenant cannot be heard to say otherwise."

It was permissible for one whose property was occupied by one holding over, without permission,

to enter the premises and eject the occupant without legal process. (*Bliss* v. *Johnson*, 73 N. Y. 529, 534; *People* v. *Field*, 52 Barb. (N. Y.) 198; *S. C.*, 1 Lans. (N. Y.) 241.) Notwithstanding the statute passed in the reign of Richard II forbidding entries upon land in support of one's title "with strong hand or a multitude of people, but only in a peaceable and easy manner," and similar statutes enacted in most, if not all, of the States of this country, the Courts have judicially determined that a landlord had the right to forcibly remove from his premises every person holding over against his will without being liable in damages, unless the force used was greater than what was necessary to effect his or their expulsion. (See *Livingston* v. *Tanner*, 14 N. Y. 64; *People* v. *Field*, *supra*.)

The landlord under the common law in force when said leases were made also had another remedy, namely, an action of ejectment. To maintain ejectment it was not necessary to give notice in advance demanding a surrender of possession by the tenant on the expiration of the term, because the one holding over against the will of the owner was deemed to have had a naked possession only and as standing in no privity to the landlord. A holding over like that in the present case was wrongful, and while thus

holding over he was deemed a trespasser. (*Livingston* v. *Tanner, supra; Smith* v. *Littlefield*, 51 N. Y. 539, 542.)

Under the common law only nominal damages were recoverable by the owner suing for ejectment. Rents and profits were not recoverable. (Sedgwick on Damages, 3 ed., Sec. 900, and note; *Cape Girardeau &c R. R.* v. *St. L. R. R. Co.*, 222 Mo. 461, 19 Corpus Juris 1233.) It was necessary for one kept out of possession to sue in trespass to recover *mesne* profits. This was changed by the New York Code of Civil Procedure, which permits the recovery of damages in the same action.

Section 1531 of the New York Code of Civil Procedure permitting the recovery of damages, where the plaintiff recovers judgment for the property or possession, reads as follows:

"*Damages recoverable; set-off by defendant.*

> In an action, brought as prescribed in this article, the plaintiff, where he recovers judgment for the property, or possession of the property, is entitled to recover, as damages, the rents and profits, or the value of the use and occupation, of the real property recovered, for a term not exceeding six years; but the damages shall not include the value of the use of any improvements made by the defendant, or

> those under whom he claims. Where permanent improvements have been made, in good faith, by the defendant, or those under whom he claims, while holding, under color of title, adversely to the plaintiff, the value thereof must be allowed to the defendant, in reduction of the damages of the plaintiff, but not beyond the amount of those damages."

In an action brought for the recovery of the possession of real property, the New York Code of Civil Procedure (Section 1681) also authorizes the granting of an injunction to prevent waste "or any other damage to the property in controversy" (*Wagner* v. *Garin*, 135 N. Y. App. Div. 727; *Littlejohn* v. *Leffingwell*, 40 N. Y. App. Div. 13). For the purpose of such injunction it is not necessary to show defendant insolvent (*Trustees* v. *Mattison*, 12 N. Y. St. Rep. 370).

The New York Real Property Law (Chapter 50, N. Y. Consolidated Laws, Sec. 230), in force at the time when the leases mentioned in the bill were entered into, made every person holding over against the will of his landlord liable to the latter in damages for double the rent reserved in the lease for the period of occupancy after its termination and receipt of notice.

The action of ejectment, or for the recovery of

possession of real property was a proceeding so expensive and dilatory as against a tenant litigiously inclined, and perhaps irresponsible, as to amount in some cases to a denial of justice; therefore, the New York Legislature created a new remedy, namely, summary proceedings to recover possession of land, which remedy was brought into existence by Chapter 194 of the Laws of the State of New York passed in 1820. (*Reich v. Cochran*, 201 N. Y. 450, 453, 454.)

Under this early statute it was enough that the landlord, lessor, his legal representatives, or agents, should make an affidavit of facts which authorized the removal of the tenant. (See 2 N. Y. Rev. Statutes, Ch. 8, Title 10, Article 2, Section 29.) And that provision, somewhat modified, has been in force ever since and is now contained in Chapter 17, Title 2, of the Code of Civil Procedure, Sections 2231 to 2265, inclusive.

The said Legislature of 1920 did not entirely do away with the action of ejectment or the right to maintain an action to recover the possession of real property (which is the statutory name for ejectment). Such action may be maintained without restrictions of any kind by owners of property not used for dwelling purposes, and by owners of property of every description outside of specified counties.

Section 2231 of the New York Code of Civil Procedure, with which we are immediately concerned, reads as follows:

> "*When tenant may be removed.* In either of the following cases, a tenant or lessee at will, or at sufferance, or for part of a year, or for one or more years, of real property, including a specific or undivided portion of a house, or other dwelling, and his assigns, undertenants, or legal representatives, may be removed therefrom, as prescribed in this title:
>
> 1. When he holds over and continues in possession of the demised premises, or any portion thereof, after the expiration of his term, without permission of the landlord; including, elsewhere than in the city of New York and Brooklyn, a case where the person to be removed became the occupant of the premises as a servant or employee and the relation of master and servant or employer and employee has been lawfully terminated or the time fixed for such occupancy by the agreement between the parties, has expired; but if by such agreement the servant was to be permitted to occupy such premises for a period beyond the term of employment such removal shall not be had under this subdivision unless such period so permitted for occupancy has expired, or the relation of master and servant or employer and employee was lawfully terminated before the expiration of such term of employment;

but nothing in this subdivision contained shall be construed as preventing the removal of such occupant in any other lawful manner. (Am. by L. 1894, ch. 333.)

2. Where he holds over, without the like permission, after a default in the payment of rent, pursuant to the agreement under which the demised premises are held, and a demand of the rent has been made, or at least three days' notice in writing, requiring, in the alternative, the payment of rent, or the possession of the premises, has been served, in behalf of the person entitled to the rent, upon the person owing it, as prescribed in this title for the service of a precept.

3. Where in any city in this State he holds over and continues in possession of the demised premises, or any portion thereof, after default in the payment, for sixty days after the same shall be payable, of any taxes or assessments levied on such demised premises which he has agreed in writing to pay pursuant to the agreement under which the demised premises are held, and a demand for the payment of such taxes or assessments has been made, or at least three days' notice in writing, requiring, in the alternative, the payment thereof and of any interest and penalty thereon, or the possession of the premises, has been served, in behalf of the landlord, upon the lessee, as prescribed in this title for the service of a precept. An acceptance of any rent by the lessor or his legal rep-

resentatives shall not be construed as a waiver of the agreement of the lessee to pay taxes or assessments, so as to preclude the lessor from the benefits of this chapter.

4. Where he, being in possession under a lease for a term of three years or less, has, during the term, taken the benefit of an insolvent act, or has been adjudicated a bankrupt, under a bankrupt law of the United States.

5. Where the demised premises, or any part thereof, are used or occupied as a bawdy-house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business.

From 2 R. S. 512 (Part 3, C. 8, tit. 10), §28; L. 1849, C. 193; L. 1868, C. 764, §1; L. 1873, C. 583, §1; see also L. 1879, C. 101. Am'd by L. 1885, C. 13; L. 1894, C. 333; L. 1913, C. 448 (in effect Sept. 1, 1913).

If the landowner did not care to avail himself of his remedy either by ejectment or summary proceedings, he was at liberty to treat the tenancy as renewed and continuing for another term of one year subject to all of the terms and conditions contained in the lease under which the tenant entered into possession. (*Smith* v. *Littlefield*, 51 N. Y. 539, 542; *Souhami* v. *Brownstone*, 189 N. Y. App. Div. 1.)

In final analysis it may be said that under the law as it existed when this housing legislation

was enacted, the landowner's remedies against persons holding over were as follows:

1. He could treat him as a tenant by sufferance and terminate his tenancy on notice as provided by statute.

2. He could elect to treat the lease renewed for one year upon the same terms and conditions.

3. He could enter and by reasonable force eject all persons from his premises, holding over against his will.

4. He could sue to recover damages, double the rent reserved in the lease.

5. He could maintain ejectment and recover damages for the use and occupation.

6. He could maintain summary proceedings.

LEGISLATION UNDER CONSIDERATION HAS ABOLISHED SOME AND SUSPENDED ALL OF THE AFORESAID REMEDIES.

1. He may not treat the person holding over as a tenant by sufferance and terminate the tenancy on notice since the right to maintain ejectment or summary proceedings is limited to specific cases, viz.:

(a) That the person holding over is objectionable, and in that case the landlord must actually

prove to the satisfaction of the Court that the tenant is objectionable.

(b) Where the owner of record being a natural person, seeks in good faith to recover the premises for the immediate and personal occupancy of himself and his family as a dwelling; or

(c) Where the owner wishes to demolish the premises with the intention of constructing a new building, plans for which shall have been duly filed and approved by the proper authorities; or

(d) A proceeding to recover premises constituting a part of a building and land which has been in good faith sold to a corporation formed under a cooperative ownership plan whereof the entire stock shall be held by the stockholders in proportion to the number of rooms occupied or to be occupied by them in such building and all apartments or flats therein have been leased to stockholders of such corporation for their own personal, exclusive and permanent occupancy to begin immediately upon the termination of any tenancy of the apartments or flats leased by them existing on the date when this subdivision takes effect. (See Chapters 942 and 947.)

These bills do not apply to buildings in the course of construction or commenced after September 27, 1920.

2. He may not treat the lease as renewed by operation of law and recover the rent reserved in the lease previously made if the tenant should plead that the rent is unreasonable, in which event the burden is cast upon the landlord to prove the rent which he seeks to recover to be reasonable. (Ch. 944 amending Ch. 136 of the Laws of 1920.)

3. He may not enter his premises and eject the person holding over even without the use of force, and by use of peaceable means, without being subjected to a penalty for a misdemeanor under Ch. 951, Laws of 1920.

4. He may not sue to recover as damages double the rent reserved for the time during which the tenant held over after notice to quit. (Chapter 138, L. L. 1920, repealing Sec. 230 of N. Y. Real Property Law, L. L. 1909, Ch. 52.)

5. He may not maintain ejectment and recover damages as provided by Section 1531 of the New York Code of Civil Procedure, because of Chapter 947, LL. 1920.

The Joint Legislative Committee responsible for this legislation deemed these laws a cure for existing evils, and as a means to increase housing facilities. The reverse is the result. United States Senator William M. Calder in a public

statement made on February 19, 1921, before the Brooklyn Real Estate Board, declared:

> "We have passed rent laws that, although well intentioned, have done more to restrict building and increase costs than any other one thing. The building of tenements and apartments has almost completely ceased and there will not be a revival of activity in this direction until these laws are modified."

The official reports of the several Bureaus of Building and the Tenement House Department of the City of New York in every respect corroborate the New York U. S. Senator's public statement.

It is a matter of common knowledge—a fact which will not be challenged—and of which the Court may take judicial notice, that immediately before the World War commenced there was such an overproduction of buildings in the City of New York that financial institutions, for their own protection against loss and to avoid further depreciation of their mortgage securities, almost unanimously determined to refuse to make building loans for the purpose of new buildings—the buildings erected up to about 1915 were non-productive. The tax officials charged with the duty of assessing the values of buildings for the purpose of taxation reduced the assessed valuation of property even in the most congested

districts. Rents were so low that many a landowner unable to meet the payment of taxes and interest on mortgages and the costs and expenses of maintenance and operation of buildings was forced to give up the property to mortgagees. The sale of property under foreclosure was an every-day occurrence. The natural consequence was that building construction almost stopped. Since we entered into the war the cost of running the State Government and the cost of running the City Government has increased 150 per cent. The cost of building materials and of labor, partly as result of the war and partly due to combination in the building trades, as proven by the same Joint Legislative Committee sponsoring the housing legislation, has increased, up to the time when that committee commenced its investigation of conditions affecting the building industry, to about 300 per cent of the cost of labor and materials in 1914.

The price of every commodity necessary and essential for the proper maintenance and operation of modern apartment houses has increased by more than 100 per cent over the costs in 1917. The cost of fuel has increased about 300 per cent, the wages of janitors, hall boys, telephone operators, elevator operators had to be increased. The statistics of the State and Federal Labor Depart-

ments show that between 1917 and 1920 wages were generally increased from 50 to 100 per cent. The men of the factories who up to 1917 occupied the ordinary tenements of the east side—the older locality of the city—realized that the modern apartment was a better place to live in. The east side was abandoned for the better dwellings in other sections of the city. The manufacturers and dealers in commodities indispensable to the preservation of human life—the coal dealer, the clothier, the grocer and the butcher, who felt no compunction in exacting tremendous prices for their wares, abandoned modern "walk-up" apartments to the laboring classes and sought for the modern elevator apartment. The competitive bidding for the modern apartment was not much in evidence until 1919. It was then for the first time that the city landowner, too, realized that the time was opportune for an increase of rents. The landowner was the last one to profit and now by legislative *fiat* he has been made the first one to suffer, not because of anything done by him contrary to established custom, but because the number of landowners consists of but an insignificant percentage of the resident population of the city.

The reports of local Bar Associations of the several counties making up the Greater City of

New York and the official reports of the Board of New York Municipal Court Justices show that ever since these "Rent Laws" came into effect these Courts have been unable to administer justice in the disposition of the regular commercial cases. These courts are filled to their utmost capacity with landlord and tenant cases. There are more than one hundred thousand such cases now pending awaiting trial. In the majority of cases, the landlords have not been able to collect the rents deposited under these laws for the payment of October rent. This is the "due process" afforded by this legislation. This is what its sponsors call "remedial legislation."

All of this legislation is sought to be justified as a proper exercise of the police power. If, therefore, these statutes are not a proper exercise of police power, no other issue having been raised, the plaintiff-appellant will be entitled to a reversal of the final decree under review.

I.

THE POLICE POWER RESERVED TO THE STATES, ALTHOUGH NOT EXPRESSLY DEFINED, IS NEVERTHELESS LIMITED TO THE EXTENT THAT NO STATE MAY PASS A LAW DEPRIVING ONE OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW.

The distinguished jurist who delivered the opinion in this case in the Court below said:

> "• • • it is said that these statutes put an end to the liberty of contract and take property for a private use, and therefore in both respects amount to a denial of due process of law. That as to one, and a very large fraction of the contractual engagements current in this city, there is no liberty of contract under these statutes cannot be denied; and that the property is taken from the landlord for the use of the statutory tenant is also true, in the sense that the property owner may be, and is in this instance compelled to let his property be enjoyed by one whom he does not want; and it may be true in another sense, although the statutory tenant be a person entirely satisfactory except in the amount of rent which he pays—if there be any legal difference between what the landlord could get in open market for his property and that reasonable rent for the fixing and recovery of which the state still affords legal machinery."

This statement is substantially correct except that in the instant case the plaintiff does not complain so much about "the reasonable rent for the fixing and recovery of which the State still affords legal machinery" as it complains about the exercise of a power which makes null and void a lease duly entered into between the plaintiff and a lessee long prior to the enactment of these statutes, by the terms of which the lessor was assured of the continued occupancy of the premises demised for a term of five years after October 1, 1920, and of the destruction of an obligation on the part of said lessee to pay an increased rent for the said period of five years. In other words, this legislation has made null and ineffective a lease made and entered into with one Benjamin Goldsmith on February 26, 1920, for the use and occupation of the premises then occupied by the defendants Schwartz and Feldman, by the terms of which Goldsmith agreed to pay for a term of five years after October 1, 1920, $3800 per annum, and the plaintiff undertook to place said Goldsmith in possession of said premises on the said first day of October, 1920. (See affidavit printed at pages 11 and 12 of record.)

The learned Judge further says:

> "It is asserted that by these statutes the obligations of plaintiff's contracts have

been impaired, and so have those of a great number of other landlords. This is plainly true—the interpretation of Section 10 of Art. 1 of the Constitution made in *Green* v. *Biddle*, 8 Wh. 1, has never been departed from.

But (says the learned Judge) when an appeal is made to the due process clause of the Fourteenth Amendment, it must always be remembered that so far as the national constitution is concerned the phrase has never been authoritatively and finally delimited—definition has been declined because it is better to ascertain meaning in each case by a process of judicial inclusion and exclusion. (Citing *Davidson* v. *New Orleans*, 96 U. S. 104.)

* * * Such decisions (and we cite but few of many) reduce the question to this—are these statutes an exercise of police power reasonably suitable for combatting or lessening the evil proved—and therefore constitutional, although at other times and other circumstances they might plainly be obnoxious to fundamental principles of constitutional government. * * * This case stands or falls on police power. * * * On reason, then, if a given subject matter is appropriate to the exercise of sovereign actions and such action has not been expressly and absolutely prohibited by the Federal Constitution as authoritatively construed, the legislative result is not forbidden, where the purpose is within range of sovereignty the means appropriate, and the reasons sufficient, even though in reaching the result some toes be trodden on, &c."

Is the State Legislature more than a mere agency of the people in which is vested the sovereignty, powers, functions and duties in so far as they pertain to civil government?

No one has ever claimed a power of sovereignty to exist in any legislative body created by constitutional enactment.

We have always assumed that the State sovereignty now devolves on the people of the State of New York. (*Matter of Carnegie Trust Co.*, 206 N. Y. 390, 397.)

The New York Court of Appeals in the early case of *Newell* v. *The People*, 7 N. Y. 9) declared (opinion of Johnson, J.) at page 95:

> "The authority of the legislature is not inherent, but is entirely derived from and subordinate to the constitution. 'The constitution is the basis of legislative authority; it lies at the foundation of all law. The constitution is the basis of legislative rule and commission by which both legislators and judges are to proceed' (2 Dall. 304). If, therefore, an act of the legislature is contrary to any provision of the Constitution, it cannot possess the force of law."

Mr. Hamilton, in the Federalist (Vol. 12, Alex. Hamilton Works, Lodge Ed., p. 238), said:

> "There is no position which depends on clearer principle than that every act of

> delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above the master; that the representatives of the people are superior to the people; that men acting by virtue of power may do not only what their powers do not authorize, but what they forbid."

In *Yeatman* v. *King* (2 N. Dak. 421, 424) the Legislature undertook to give priority over an earlier mortgage to a seed grain lien to meet an alleged economic need, and they called that a "tax." In holding this law unconstitutional, the Court said:

> "The voice of the legislature cannot alter the essential nature of things. No legislative fiat can make that a tax which is not and cannot be a tax. • • • Due process of law might be defined to embrace arbitrary confiscation; such a thing as an *ex post facto* statute might be defined practically out of existence, and many, if not all the barriers erected to shield the fundamental rights of the citizen from legislative assault—barriers seemingly of adamant and apparently standing upon abiding foundations would crumble before the breath of legislative definition. We

> are confident that the agent has no power to define away the limitations upon his delegated authority. Said Mr. Justice Miller in *Davidson* v. *New Orleans*, 96 U. S. 97, 101: 'But when, in the year of grace 1866, there is placed a declaration that no state shall deprive any person of life, liberty, or property without due process of law,' can a State make anything due process of law which by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition of the State is of no avail, or has no application where private rights are affected under the form of State legislation."

The learned counsel for the appellees have said in their brief submitted to the Court below that the statutes are justified because consonant with the State's "public policy." The Court below met this argument by saying:

> "The assertion gets nowhere—for it is firmly established that no State can have a public policy except what is to be found in its constitution and its laws constitutionally enacted" (citing *People* v. *Hawkins*, 157 N. Y. 1 at 12).

From the earliest colonial days to the present time the people of the State of New York refused to delegate to its legislative bodies the power to interfere with the use and disposition of private property. In the reign of William and Mary,

1691, the legislative authority of the then Colony of New York enacted a law, and among the provisions of that act was, "that no free man shall be taken and imprisoned or be disseized of his freehold or liberty or free customs, or outlawed, or exiled, or any other ways destroyed, nor shall be passed upon, adjudged, or condemned, but by lawful judgment of his peer, and by the law of this province, justice nor right shall be neither sold, or delayed to any person within this province." (Language quoted modernized.)

By the first New York State Constitution adopted in 1777, such parts of the common law of England and the Statute, of the Colony of New York as were not repugnant to the Constitution were continued. The people then assumed the existence and perpetuation of the fundamental and acknowledged rules and principles. (*Gautier* v. *Ditmar*, 204 N. Y. 20; *Waters, etc.*, v. *Gerard*, 189 N. Y. 302; *People* v. *Daniell*, 50 N. Y. 274.)

This Court has steadfastly adhered to the rule that in passing upon legislative power of any State it will determine the question in accordance with the laws existing when the State came into being. (*Muhlker* v. *N. Y., N. H. & H. R. R. Co.*, 197 U. S. 544, 570; *Lowe* v. *Kansas*, 163 U. S. 81.)

The exercise of Police Power has always been limited. Laws regulating the erection and main-

tenance of tenements, regulating weights and measures, limiting hours of employment, defining nuisances, restricting heights of buildings, and similar legislation to prevent frauds or intended for the preservation of public health in order to be constitutionally valid must be prospective and not retroactive. (*McCulloch* v. *Maryland*, 4 Wheat. 316; *Keller* v. *U. S.*, 213 U. S. 138, 145; *Fougera & Co.* v. *City of New York*, 224 N. Y. 269; *Eubank* v. *Richmond*, 226 U. S. 137; *Buffalo* v. *Chadeayne*, 134 N. Y. 163; *Hamilton* v. *Kentucky Distillery Co.*, 251 U. S. 146.) The power to take or destroy property, except for the abatement of public nuisance to avoid imminent danger, has been withdrawn from the Legislature by the State Constitution (Article 1, Sections 1 and 6) and limited by the 14th Amendment of the Federal Constitution. (*Brevoort* v. *Grace*, 53 N. Y. 245, 255; *People* v. *Fisher*, 190 N. Y. 468; *Rockwell* v. *Nearing*, 35 N. Y. 302; *Powers* v. *Bergen*, 6 N. Y. 359.)

In *Pumpelly* v. *Green Bay Co.* (13 Wall. 166) this Court at pages 177, 178 said:

> "It would be a very curious and unsatisfactory result in construing a provision of constitutional law, *always understood to have been adopted for the protection and security to the rights of the individual as against government*, and which has received

> the commendation of jurists, statesmen and commentators as placing the just principles *of the common law on that subject beyond* the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely; can inflict irreparable injury to any extent; can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word it is not taken for public use." (Italics ours.)

Between mere regulation of trades and business and the destruction of property or its attributes, there is a line of demarcation which is difficult to define with precision. (*Wynehamer* v. *People*, 13 N. Y. 378, 387; *Fougera & Co.* v. *City of New York*, 224 N. Y. 269.) When the destruction of property is effected it makes no difference whether provision for compensation is made or not so long as the property is not taken for *public* use and authorized by the State Constitution.

In *Embury* v. *Conner* (3 N. Y. 511) Mr. Justice Jewett, after reviewing authorities, said:

> "I think these decisions should be regarded as having settled the point that a statute is unconstitutional and void which authorizes the transfer of one man's property to another without consent of the owner, although compensation be made."

Laws violating the rights of personal liberty or private property in conflict with fundamental principles of our own government, the power to pass them, is never taken for granted in the absence of authorization and organic law.

In the absence of proof of express legislative authority for the acts under consideration, this court is urged to construe due process of law in accordance with precedent in English History and we are referred for authority, for this proposition to *Murray's Lessee* v. *Hoboken Land Improvement Co.* (18 How. 272, 276) where a federal tax statute was held to constitute due process of law not because of ancient history, but because it was in accordance with the settled common law of England at the time of the adoption of the Federal Constitution. The same rule was followed by this Court in *Louie* v. *Kansas, supra,* where it was held:

> "Whether the mode of proceeding, presented by this statute, and followed in this case, was due process of law depends upon the question whether it was in substantial accord with the law and usage in England before the Declaration of Independence and in this country since it became a nation in similar cases."

Instead of presenting proof of authority for this legislation, our opponents fall back upon

precedent found in decision of this Court interpreting the constitutionality of legislative enactments expressly authorized by State constitutions or implied because incidental to the exercise of power conferred upon Congress by the Federal Constitution. Conceding, however, that the housing legislation is more drastic and revolutionary than any law ever enacted in any state of the Union, our distinguished and learned opponents ask that we go back to ancient history and adopt the principles of the Romans governing the rights of serfs and tenants who were mere slaves; that we take into consideration the Irish Land Bills affecting tenantry, and that we accept as our own laws the acts of the British Parliament enacted during the World War. They might have gone further and asked us to adopt as laws the decrees of Soviet Russia.

It is true that the meddling by legislation with things and property which exclusively concern their possessor is not new. One of the causes of the French Revolutionary War was the regulations which hampered trade—when the state asserted power to decide on the persons to be employed, the materials to be used, the qualities of the product and the articles to be made. In England, the people resented the laws enacted during the reign of Edward III when the subjects were prohibited from exporting staple goods

under penalty of death and confiscation, when under the same regime laborers were coerced into working for fixed wages.

But even in the time of Edward III we find that by the statute of 28 Ed. III, Ch. 3, it was declared:

> " • • • that no man, of what state or condition that he be, shall be put out of his land or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answere by due process of law."

The institution of property was made safe by the Constitution, and from the moment of its adoption the power to legislate to deprive any citizen of his property and the use and enjoyment thereof became completely extinguished. The police power does not extend beyond the right to enact laws providing for rules of action and conduct respecting property so as to preserve the health, safety, morals and welfare of the community. Any legislative act which deprives a man of the right to choose his tenant or to oust his tenant after the term of his demise has expired is in excess of the power delegated by the people to the Legislature. Such acts of the Legislature which dictate to the owner of property and force him

to acquiesce in the trespass on his property is nothing short of tyranny and despotism.

Had the Legislature enacted laws abolishing the property right of the merchant, of the manufacturer, and of the trader, the people at once would have revolted against such action, but as these acts concern but a small and insignificant class, the majority of the traders may feel content with this legislation forgetting *"that those who deny freedom to others deserve it not for themselves."*

The legislature of the State of New York, during its session in 1920 enacted many laws for the preservation and protection of property rights, and, indeed, these laws still recognize the institution of private property. Every tenant occupying a dwelling house is secure in his property. No one may take it from him or disturb his possession. Dwelling houses in the City of New York have not been declared affected with a public interest such as railroads, telephone and telegraph business, etc. Anyone desiring to enter into a contractual relation with a business affected with a public interest may compel by mandamus those engaged in that business to furnish him with service and accommodation for which that business has been established. Landowners in this State may not be compelled by any existing laws to enter into a lease with anyone other than their former tenants, who are in possession of their

property. One may still own a 25 story apartment house fit for dwelling purposes only and keep the doors locked and leave all the apartments vacant; there is no law that can compel him to enter into a contractual relation with homeless citizens who were not formerly tenants of his. Therefore, whatever argument be based upon the exercise of the police power respecting business affected with a public interest, such as grain elevators, railroads, etc., is not pertinent to the question at issue. Nor are the principles pronounced in the cases involving the taking of property of an individual by imposing an obligation upon him to pay taxes or to pay the cost and expense of maintenance of sidewalks applicable. The State may, by proper legislation, forbid the use of public property and impose conditions for such use, and the doing of an act which may involve the taking of property of an individual, and even to pay damages and costs for injuries sustained by third parties as the result of negligence in the performance of duties so imposed. *Delaware, etc. Co.* v. *Maddin*, 241 Fed. Rep. 811. But such duties and obligations cannot be imposed upon individuals for the privilege of using their private property for lawful private purposes.

It is true that neither the "contract" clause nor

the "due process" clause contained in the Constitution has the effect of overriding the State in establishing regulations necessary to secure the health, welfare, safety, and good order of the community; that this power can neither be abdicated nor bargained away and is inalienable, even by express grant, and that all contracts and property rights are held subject to its fair exercise; that the liberty of making contracts is subject to conditions in the interest of public welfare. But it must be borne in mind that in every instance where legislation of that character has been sustained, the legislation itself was prospective and not retroactive; that is to say, the legislation related to future conduct and did not affect past transactions, unless and except where the legislation was enacted by express authority of the Constitution (*Wilson* v. *New*, 243 U. S. 332). This is illustrated by the case of *Buffalo* v. *Chadeayne* (134 N. Y. 163), where the Common Council of the City of Buffalo adopted a resolution creating fire limits. The right to create fire limits is an undoubted exercise of the police power, but the Court there held that while such ordinance was lawful in so far as the restrictions had for their purpose the prevention of the erection of wooden buildings in the future, it was void and unconstitutional in so far as it attempted to affect existing buildings, which in themselves

had not become nuisances by reason of their being dangerous to the public.

The difference between prospective and retroactive legislation is that one destroys vested rights and interest in property, while the other regulates the use of property. The police power of the State is the power to regulate the use of property, but is not equivalent to the power to destroy property. This has been recognized in the early decisions of the United States Supreme Court and has remained a settled principle of law.

Again, legislation under police power must be for the general public and not for a particular class or for the benefit of private individuals. The State may, in the exercise of its police power, restrict the height of buildings and create zoning restrictions. (*Lincoln Trust Co* v. *Williams*, 229 N. Y. 313). But when a legislature authorizes an ordinance which requires the municipal authorities, upon the petition of two-thirds of the owners in a particular locality, to establish a building line without the consent of the abutting owner, it conflicts with the Fourteenth Amendment and is unconstitutional. (See *Eubank* v. *City of Richmond*, 226 U. S. 137, 145.)

The State may, in the exercise of its police power, prohibit the sale of goods at a lower rate

in one place than in another for the purpose of destroying the competition of any regular and established dealer by unfair competition, which tends to drive another out of business and enable the person violating the statute to create a monopoly for himself (*Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 162), but the State may not, except in the case of monopolies and public utilities, compel the sale of merchandise or permit the use of property, even for compensation (*Terminal Co.* v. *Kutz*, 241 U. S. 256).

In *Producers' Transportation Co.* v. *Railroad Commission* (251 U. S. 228, 232) the lower Court found that the corporation procured a charter as a common carrier and availed itself of the right of eminent domain and in fact acted as common carrier, and, therefore, the Court held that it was subject to state rate regulations. But, in that case, Mr. Justice Van De Vanter said:

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, that is to carrying for the public, *the state could not by mere* legislative fiat or by any regulating order of a commission convert it into a *public utility and make its owner a common carrier, for that would be taking pri-*

> *vate property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment* (citing *Chicago, B. & Q. R. R. Co.* v. *Illinois*, 200 U. S., 561; *Northern Pac. R. R.* v. *North Dakota* 236 U. S., 575; *Associated Oil Co.* v. *Railroad Commrs.*, 176 Cal., 318)." (Italics ours.)

In *Chesapeake & Potomac Telephone Co.* v. *Manning* (186 U. S. 247), this Court had under consideration the Act of Congress of June 30, 1898 (30 Statute at 525, 533, Chap. 540),—the District Appropriation Act regulating the rates which a telephone company may charge in the District of Columbia,—and held that rentals received by a telephone company for private telephone systems installed by it must, together with the expense thereof, be excluded from consideration in inquiring into the reasonableness of the rates which telephone companies doing business in the District of Columbia are prohibited from exceeding by provisions of the said Act. The Court there said, at pages 246, 247, 248:

> "We pass, then, to inquire whether any other limitation or qualification of the prohibition found in this proviso may fairly be read in its language. And we start with the proposition that it cannot be presumed that a legislature intends any

interference with purely private business. It cannot ordinarily prescribe what an individual or corporation, engaged in a purely private business, shall charge for services, and, therefore, although the language of a statute may be broad enough to include such private business, it will generally be excepted therefrom in order to remove all doubts of the validity of the legislation. It appears that some portion of the defendant's business is of a purely private nature, the receipts whereof are spoken of in its reports as private rentals, and as to such business Congress could not, if it would, prescribe what shall be charged therefor. In many buildings, both those belonging to the government or the District, and those belonging to private individuals, is what may be called a local telephone plant; that is, an arrangement of telephones by which parties in different rooms can communicate with each other; a system which is not connected with the general telephone exchange, and is no more public in its nature than the speaking tubes or call bells in a building. It is only for the personal use of parties in the building. By it those in the building cannot communicate with the general public nor can such public reach parties in the building. It is simply a local convenience for the use solely of those who are in the building. Such combinations of telephone instruments in a single building, with no outside connection, are furnished by the

> defendant, and the rentals therefrom, as well as the expenses thereof, are entered in its books of account, and constitute a part of its business. The mere fact that such telephones are furnished by the company, which also does a public business, does not make them a part of such public business, or subject them to the regulation by Congress of its charges. A railroad company may, if authorized by its charter, carry on, not simply its strictly railroad business, but also an establishment for the manufacture of cars and locomotives. The fact that it is engaged in these two different works would not in itself subject the manufacture of cars and locomotives to the supervision of the legislature, although such body would have the right to regulate the charges for railroad transportation. So, in an inquiry into the reasonableness of the charges imposed by Congress in this legislation, it is essential that the receipts and expenses from such private telephone systems be excluded from consideration."

And see generally *Kansas City Gas Co.* v. *Kansas* (198 Fed. Rep. 114); *Kansas Natural Gas Co.* v. *Haskell* (172 Fed Rep. 566); *Moore* v. *New Orleans W. W. Co.* (114 Fed. Rep. 382); *Gibbs* v. *Tally* (133 Cal. 376); *Louisville R. R. Co.* v. *Central Stock Yards Co.* (212 U. S. 151); *City of Buffalo* v. *Chadcayne* (134 N. Y. 163); *Yates* v. *Milwaukee* (10 Wall. 497); *Scranton* v. *Wheeler* (179 U. S. 161); *People, etc.* v. *Board of Health*

(140 N. Y. 1); *Hume* v. *Laurel Hill Cemetery* (142 Fed. Rep. 565); *Reinman* v. *Little Rock* (237 U. S. 171); *Matter of Jacobs* (98 N. Y. 106).

We are told by the learned counsel for defendants that it was early realized that there were many callings and businesses to which the public necessarily had to resort and in which, therefore, they had an interest. If these were to be left undisturbed by the law, it was patent that they would in numerous instances have practically unlimited power to oppress the public.

"Accordingly," they say, "government was called upon to protect the public from extortion, and both then and now callings and property charged with a public interest have been regulated by the state."

They also say: "What shall be so regulated depends entirely upon the peculiar economic and social conditions of the times." They urge that "at common law doctors, farriers, victuallers, millers, tailors, bakers, and many others, whom we would today regard as engaged in purely private pursuits, were regulated and controlled and compelled to serve all by the law, because of the potentiality for oppression which then inhered in those callings and businesses and the well-defined public interest which in consequence thereof then attached to them."

If once the door is opened to the affirmance of this proposition, then all significance in the guaranty of the equal protection of the laws is lost.

To quote the language of Mr. Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616:

> "Illegitimate and unconstitutional practices get their first footing * * * by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adherence to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon. Their motto should be '*Obsta principiis*'."

It is true that shelter is as much a necessity as bread. It is contended that it is the obligation of the State to see that its citizenry does not lack such necessities. But it is not contended that it is the obligation of the State to provide the necessities of life gratis for physically and mentally able citizens. So long as bread and shelter must be paid for, it would follow that the State, in order to discharge the obligation to its citi-

zenry of seeing that they should not lack the necessities of life, would have to provide means for its citizens to obtain the wherewithal with which to purchase such necessities; that is, the State would be compelled to provide its citizens with employment, in the event that they could not find employment, in order that they might obtain the means to procure the necessities of life. Is the trader or manufacturer to be compelled by law to furnish employment for the needy when he has not the capital required to operate? Can the State in case of such emergency compel its banking institutions to furnish the needed capital?

If the people of the State of New York intend to change the public policy as declared by the organic law of the State, it is their privilege to do so by amending their Constitution. If the people of this nation desire the abolition of private property, they may do so only by amending the Constitution of the United States. The Legislature is not vested with power to alter the Constitution of the State or of the United States by construction. When the people of New York State, for economic reasons, prohibited by their constitution the leasing of agricultural lands for a period longer than twelve years (Article 1, Sect. 13, New York State Constitution, 1845; Article 1, Section 14, N. Y. Constitution, 1894) the will of

the people was enforced by the Courts. (*Mass. Nat. Bank* v. *Shinn*, 163 N. Y. 360; *Parsell* v. *Stryker*, 41 N. Y. 480). In 1894 the New York State Constitution was amended so as to authorize owners of agricultural swamp lands to institute proceedings to acquire lands of third parties for ditches, but until this amendment went into effect, the right to acquire land for that purpose under the Drainage Act of 1869 (Ch. 888, L. 1869) was denied, except where shown that it was necessary for the preservation of public health. (*Matter of Town of Penfield*, 3 N. Y. App. Div. 30, affirmed 155 N. Y. 703.)

That the legislative power must be exercised in the manner provided by the State Constitution is best illustrated by the lottery cases. (*Stone* v. *Mississippi*, 101 U. S. 814; *New Orleans* v. *Houston*, 119 U. S. 265.)

If in the opinion of the State Legislature the alleged emergency justified the exercise of the constitutional power of eminent domain, it should have provided legislation authorizing the taking of the property for public use in accordance with the provisions of the State Constitution.

In the State of New Jersey, one of the municipalities attempted by ordinance to require all landlords to file with the City Clerk a copy of

notice to the tenant demanding possession or increasing rent. In declaring this ordinance invalid Mr. Justice Swayze of the New Jersey Supreme Court, in the case of *Stell* v. *Mayor, etc.*, (111 Atl. Rep. 274) said:

> "No doubt it is desirable that there should be houses for all citizens, but they cannot be provided legally by using without leave or confiscating the property of the house-owners. Housing can only be provided either in the ordinary commercial way or by private charity."

The burden rests upon the sponsors of the legislation under consideration to prove that the legislature acted within the powers expressly delegated and conferred upon it by the people of the State, and that the exercise of the asserted power is not prohibited by the Federal Constitution.

The sponsors of the legislation under consideration urge the term "emergency" as an omnipotent power which, by its utterance, will like a cabalistic charm silence the laws while citizens are being deprived of their property rights. They demand that all constitutional bulwarks created by the founders of this republic for the protection of life, liberty and property be destroyed because of an alleged "public necessity" or for other alleged humanitarian causes. Similar distressing conditions and alleged "emergency" was urged

before this Court (*Edwards* v. *Kearzey*, 96 U. S. 595) in support of the Homestead Exemption Laws of the State of North Carolina to uphold their constitutionality in so far as they affected obligations contracted before said laws came into effect. Mr. Justice Swayne, who delivered the majority opinion of this Court, went into the history of the country preceding the adoption of the Constitution, in order to show that the very purpose of the constitutional prohibitions was to prevent legislatures from meddling with business of private nature and from tampering with obligations of contract in times of stress. Mr. Justice Swayne pointed out (at page 601) that

> "'Policy' and 'humanity' are dangerous guides in the discussion of legal propositions. He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any. Our duty is simply to execute it. Where the facts are undisputed, it is always the duty of the Court to pronounce the legal result."

And at page 605 he said:

> "State legislatures in too many instances yielded to the necessity of their constituents, and passed laws by which creditors were compelled to wait for the payment of their just demands, or to tak-

property at a valuation. * * * We think the views we have expressed carry out the intent of contracts and the intent of the Constitution. The obligation of the former is placed under safeguard of the latter. No State can invade it, and Congress is incompetent to authorize such invasion."

II.

THE POLICE POWER OF THE STATE IS A POWER TO REGULATE THE FUTURE USE OF PROPERTY AND IS NOT EQUIVALENT TO A POWER TO INVALIDATE PAST TRANSACTIONS, AND TO DISCHARGE CONTRACT OBLIGATIONS.

It has been frequently said that it is difficult to give a definition which properly describes and limits the police power of the Legislature. The difficulty arises only when we come to consider legislation prescribing rules for the conduct of persons and for the use and enjoyment of property. But everyone must agree that the police power is nothing more or less than the power to do justice among men; that the underlying basis for the exercise of such power is natural justice which demands that no man should be judged to be wrong so long as he conducts himself according to established usage and custom and does

not infringe upon the rules of conduct established by usage or custom or prescribed by law.

True, what may be right today may be wrong tomorrow, but this is so only to the extent that the usages and customs and rules of conduct may have changed by common assent, or by the enactment of legislation. But the change in usage and custom must precede the action and conduct by which right and wrong is to be judged. Law is a rule prescribed by human society for the government of human conduct. To be guilty of improper conduct in the social and business relations of men, the action or conduct must conflict with obligations assumed by the actor or implied by the custom and usage of society. Immorality is that which is *contra bonos mores*. Therefore, it is an accepted principle of jurisprudence that a legislative act which is not merely to confirm or validate past transactions is not law if it does not prescribe a rule of action for future conduct, whether the same relates to personal conduct or the use and enjoyment of property. Statutes and constitutions are construed to operate prospectively. (*Shreveport* v. *Cole*, 129 U. S. 36, 43; *Sawyer Spindle Co.* v. *Carpenter*, 133 Fed. Rep. 240.)

On this principle the constitution prohibits the enactment of *ex post facto* laws, and no State

may pass a law that makes an act done before the passage of the law, and which was innocent when done, criminal and the commission thereof punishable. (See leading case of *Calder* v. *Bull*, 3 Dall. 386, 390.)

The Legislature could not, therefore, declare the right to recover possession forfeited when the person claiming possession has not done any act prohibited, or failed to perform any act commanded, by law at the time when the right to possession accrued. The defendants, on the other hand, in order to be entitled to a legislative remedy not existing at the time when the lease was made, must have had some right arising under the lease or implied by law when the lease was made.

"Until a right exists there can be no remedy." (*Dougan* v. *Champlain Trans. Co.*, 56 N. Y. 115; *Veeder* v. *Little Falls*, 100 N. Y. 343; *Hulse* v. *N. Y., etc., R. R.*, 71 Hun, 40; *Newark El. Light Co.* v. *Garden*, 78 Fed. Rep. 74; *Cleveland, etc. R. R.* v. *Bullentine*, 84 Fed. Rep. 935.)

The right to a renewal of a lease for another term depends entirely upon the agreement of the parties to the lease. (*Reed* v. *Campbell*, 43 N. J. Eq. 406; *Whitlock* v. *Duffield*, Hoffman Rep. (N. Y.) 110; *Abeel* v. *Radcliff*, 13 Johns. (N. Y.) 297.)

In the absence of such agreement or conduct on the part of the lessor sufficient to estop him from denying that such agreement was made, the Legislature, which is not possessed of judicial function, may not exercise a power not possessed by a court of equity.

"The law of the land" does not mean the very act of legislation which takes away a right from one and gives it to another. The true construction of the phrase is—

> "that when rights accrued to the citizen under existing law, there is no power in any branch of government to take them away; but where they are held contrary to existing law or are forfeited by its violation, these may be taken from him—*never by action of the legislature, but in the due administration of the law before judicial tribunals of the State.*"

(*Williams* v. *Port Chester*, 72 N. Y. App. Div. 567; *Ochoa* v. *Hernandez Y Morales*, 230 U. S. 139; *Chicago, M. & St. P. R. R.* v. *Wisconsin*, 238 U. S. 491; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413; *Riverside & D. River Cotton Mills* v. *Menefee*, 237 U. S. 189.)

It very often happens that a contract becomes impossible of performance because of a supervising law subsequently enacted. There is a

consequent impairment of *performance*. (*Louisville, etc., R. R.* v. *Mottley*, 219 U. S. 467, 482, 484), *but not of obligation*. The party entitled to the performance of the contract may under such circumstances recover the value of the consideration given in reliance upon the promise which has become impossible of performance. (*Jones* v. *Judd*, 4 N. Y. 411; Williston on Contracts, Section 1974; *Crowley* v. *Northern Pac. R. R.*, 123 Pac. 998.)

The statutes now under consideration impair the *obligation*, and not merely the performance of the obligation.

The contract which the defendant-in-error in *Louisville & Nashville R. R. Co.* v. *Mottley* (*supra*) sought to enforce was not by the statute prohibiting rebating, etc., declared discharged of all of the obligations created by the contract with the plaintiff-in-error. Congress did not intend, by this statute, to operate directly upon the specific contracts previously made between railroad companies for the composition or settlement of their obligations. In that case Congress did not attempt to invalidate railroad passes issued before the enactment of the statute. It prohibited only the issuance of free passes and to receive compensation not specified in the tariff

filed and in effect at the time when the law went into effect. This distinction between a statute operating directly upon the contract obligation and a law which by the regulation of future conduct may indirectly impair the performance of the obligation is made plain in the *Mottley* case. Mr. Justice Harlan, at page 481, said:

> "It is not determinative of the present question that the Commerce Act, as now construed, will render the contract of no value for the purpose for which it was made. In the Legal Tender cases, above cited, the Court, referring to the Fifth Amendment, which forbids the taking of property for public use without compensation, or due process of law, said: 'That provision has always been understood as referring only to direct appropriation and not to consequential injuries resulting from the exercise of a lawful power. It has never been supposed to have any bearing or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, or a war, may inevitably bring upon individuals great losses; may indeed render valuable property almost valueless. They may destroy the worth of the contract.'"

In the instant case the Legislature does not forbid the defendant from vacating plaintiff's premises at pleasure. It does not prohibit ten-

ants generally from moving from one building into another, so as to make their contractual obligation to surrender the demised premises impossible of performance. On the contrary, the Legislature left the tenant free to perform his obligation, if he so desired, but at the same time it discharged him from that obligation for the sole purpose of preventing its enforcement by the lessor. The law operates directly upon the contract—it destroys it completely without prohibiting its performance.

The impairment of the obligation is not the indirect result of a regulation of the police power of the State respecting the conduct of particular business. These laws were not enacted for the regulation of the business of the landlord.

The Legislature assumed authority to declare that the obligation of the tenant to surrender possession on the expiration of the term specified in the lease is released; it assumed a power to make a trespass a lawful possession; it assumed a power to extend all of the lessor's obligations for the period which the person holding over may desire to continue in possession; it assumed a power to prevent the lessor from performing his obligation under a lease entered into before the enactment of the law, which by

its terms was to become operative after the date of this legislative enactment. In the exercise of this power the Legislature has not imposed upon the person holding over the obligation to pay the rent reserved in the lease which it attempted to extend at the will of the lessee. The stipulated rental value as fixed by the parties to the contract is disregarded. The power to fix the rental value is delegated to the Court or jury. Such innovation in the administration of justice has been declared by this Court to be repugnant to the constitution.

In *W. & W. R. R. Co.* v. *King* (91 U. S. 3) this Court, considering a statute of North Carolina which allowed a jury to pass judgment upon the value of a contract and did not require them to take the value stipulated by the parties, said at page 5:

> "A provision of law of that character by constituting the jury a revising body over indiscretions and bad judgments of contracting parties, might in many instances relieve them from hard bargains, though honestly made, upon erroneous estimate of the value of the article purchased, but would create insecurity in business transactions which would be intolerable. It is sufficient, however, to say that the Constitution of the United States interposes an impassable barrier to such new inno-

> vations in the administraton of justice, and with its conservative energy still requires contracts, not illegal in their character, to be enforced as made by the parties, even against any State interference with their terms."

This case was followed in *Effinger* v. *Kenny*, 115 U. S. 571.

The Supreme Court has not in any case departed from its early decisions. Indeed, the rule has always been that as a State cannot enact a law acting directly upon the terms of the contract, so also it cannot pass a law professing to regulate the remedy when, in effect, it impairs the obligation of the contract. (*Gantly* v. *Ewing*, 3 How. 707; *Barnitz* v. *Beverly*, 163 U. S. 118; *Louisiana ex rel. Nelson* v. *St. Martin's Parish*, 111 U. S. 716; *McGahey* v. *Virginia*, 135 U. S. 662; *Kring* v. *Missouri*, 107 U. S. 221.)

Chief Justice Marshall, in the early case of *Fletcher* v. *Peck* (6 Cranch 87), at page 138, said:

> "A law annulling conveyances between individuals, and declaring that grantors should stand seized of their former estate, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from

> the obligation of executing their contract by conveyance."

The New York Court of Appeals, in *People* v. *Batchellor* (53 N. Y. 128), at page 140, said:

> "It is within the province of the Legislature to provide for enforcing the performance of contracts when made, but to enforce the making of them by individuals is entirely beyond it."

And so in *Brevoort* v. *Grace* (53 N. Y. 245) the same Court held:

> "The power of making contracts for the sale or disposition of private property for individual owners has not been delegated to the Legislature, or others."

In *Adair* v. *U. S.* (208 U. S. 161, 173) this Court reaffirmed the doctrine stated by Judge Cooley in his work on Torts, in the following language:

> "It is the part of every man's civil right that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests on reason or is the result of caprice, prejudice, or morals. With his reasons neither the public nor third parties have any legal concern."

All of these fundamental principles have been disregarded by these statutory enactments. The Legislature has not only attempted to enforce

the making of contracts, but it has assumed the power of declaring all existing leases voluntarily entered into rescinded, whenever the lessee deems himself aggrieved because of the rent exacted as condition for the making of the lease. While the immediate issues in this case do not bear directly upon this statute (chapter 944, Laws of 1920), it may not be left unnoticed since it is *pari materia* of the legislation under consideration. By this statute the tenant need not prove that the contract was influenced by some threatened or actual exercise of power possessed or believed by him to be possessed by the lessor—proof essential to establish duress as ground for rescission (*French* v. *Shoemaker*, 14 Wall. 314; *Radich* v. *Hutchins*, 95 U. S. 210; *Andrews* v. *Connolly*, 145 Fed. Rep. 43). The lessee repudiating the lease is not required to offer to surrender possession as condition for rescission as required by settled principles of equity. (*Gay* v. *Alter*, 102 U. S. 79.) His mere dissatisfaction with the terms of the lease is sufficient to permit him to compel the lessor to come into court to prove that the rent reserved is fair and reasonable. The Court is not bound to accept the Bill of Particulars filed by the landlord in accordance with the statute as proof. The law does not impose a duty upon the Court to award the landlord a fixed percent-

age as compensation for his investment. No provision is made by law to secure the owner for losses in rents by reason of vacancies, insolvency of tenants, risk of loss by damage or deterioration to the property, which every owner of property takes into consideration when he invests capital in buildings used for dwelling purposes. The determination of the Trial Court as to the amount of rent payable to the landowner must of necessity be a determination of a question of fact, not always a proper question for review. Yet the District Court in the instant case, says:

> "As a matter of law we cannot hold that the market value, or price, *i. e.*, what is fetched when goods are bought and sold in the *ordinary* course of trade—*Muser* v. *Magone*, 155 U. S. 240—is for the use of real property anything different from that reasonable rent or use—charge secured to the landlord by these statutes. We have nothing before us but the statute—no accusation is made that those charged with adjusting rent are rendering the acts unconstitutional by their practical interpretation of their duties thereunder. • • • We speak only in the present tense; and hold the statutes complained of to be constitutional; but it does not necessarily follow that because they violated no fundamental law in September or December, 1920—they will never so violate. Should it be shown hereafter that the reason for

the laws had in fact passed, questions might arise not now before us, and as to which we do not wish to seem to foreclose discussion."

This Court has not, as yet, by any decision pronounced as a settled principle "that it must now be accepted on the authority of *German Alliance, etc., Co.* v. *Kansas* (233 U. S. 389), or *Rast* v. *Van Deman* (240 U. S. 342), that any business is affected with a public interest as soon as the electorate become sufficiently interested in it to pass a regulatory statute" as stated in the opinion of the Court below.

Courts were established to construe the law but not to interpret public clamor or to cater to the demands of the electorate (*Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 153, 155, 156).

It is said by the New York Court of Appeals in *People* v. *Warden* (137 N. Y. 116, 123) that "the tendency of the times undoubtedly is to rush to the legislature for a cure for all the grievances of citizens, whether real or imaginary, and many novel experiments are the result." Indeed, as said by that Court, "It is novel legislation indeed that attempts to take away from all the people the right to conduct a given busi-

ness because there are wrongdoers in it, from whose conduct the people suffer." Such evils can be remedied only by creating a remedy and prescribing for future conduct in a manner just to the person engaged in the trade or business as well as to the persons served by them. The State has the power to enact laws to prevent fraud, to compel each person to use his own so as not to injure his neighbor. But the State may not by legislative act regulate business purely private, prescribe the conditions under which it shall be conducted, fix the price of commodities or service, or interfere with the freedom of contract. That this is the settled law cannot be doubted. (*Lochner* v. *New York*, 198 U. S. 45; *Terminal Co.* v. *Kutz*, 241 U. S. 256; *Chesapeake, etc., Co.* v. *Manning*, 186 U. S. 238, 247; *A. M. Holt Hardware Co.* v. *Boyle*, 263 Fed. Rep. 134; *Detroit Co.* v. *Kenain*, 264 Fed. Rep. 845.)

The founders of this republic intended to protect the minority from the majority. They provided for a majority rule, but no change of the organic law can be made except as provided by the constitution. No power resides in any Legislature to change or control the constitutional safeguards. (*Pumpelly* v. *Green Bay Co.*, 13 Wall. 166.) What was said by Chief Justice

Marshall in *Gibbons* v. *Ogden* (9 Wheaton 222) may well be repeated at this time:

> "Powerful and ingenious minds, taking as postulates that the powers expressly granted to the Government of the Union are to be contracted, by construction, into narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, *may, by course of well digested, but refined, metaphysical reasoning, founded on those premises, explain away the constitution of our country, and leave it a magnificent structure indeed, to look at, but totally unfit for use.* They may so entangle and perplex the understanding as *to obscure the principles which were before thought quite plain, and induce doubts, where if the minds were to pursue their own course none would be perceived. In such a case it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and when sustained to make them the tests of the arguments to be examined."* (Italics ours.)

This Court, in *Hurtado* v. *California* (110 U. S. 516, 532), at page 532, said:

> "In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all

the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongrous to measure and restrict them by the ancient customary English law, they must be held to guaranty not particular forms of procedure, but the very substance of individual rights to life, liberty and property."

III.

THE GENERAL GRANT OF LEGISLATIVE POWER CONTAINED IN THE STATE CONSTITUTION DOES NOT AUTHORIZE THE LEGISLATURE TO TAKE PRIVATE PROPERTY IN THE EXERCISE OF EMINENT DOMAIN, WITHOUT THE CONSENT OF THE OWNER, FOR ANY BUT A PUBLIC OBJECT.

It is well within the legislative power to make the State the sole actor and in the interest

of a public necessity to authorize such interference by the public authorities with private rights as would abate conditions prejudicial to the health or comfort of the community, or to authorize private persons to take the initiative in the same direction of public utility. The learned counsel for the defendants have made reference to political history, ancient and modern, but they have not referred to and are unable to find anything in the past political history of the State of New York which would justify laws by which a citizen may be authorized to take the property of another citizen by the exercise of the right of eminent domain for a purpose which is exclusively for private benefit, although incidentally of such possible benefit as the cheapening of the cost of habitation to the public. In the consideration of the constitutionality of novel legislation this Court has always given due regard to prior conditions in the laws and decisions of the Courts of the State upon the subject, which illustrates some settled policy of the community. That can be understood by reference to the cases which arose under the Mill Acts of New England, the Irrigation and Drainage Acts in the Western States and in New Jersey. (*Wilson* v. *Blackbird Creek Co.*, 2 Peters 245; *Charles River Bridge* v. *Warren Bridge*, 11

Peters 420; *Whithers* v. *Buckley*, 20 How. 84; *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9; *Wurts* v *Hamen*, 115 U. S. 512; *Fallbrook Irrigation* v. *Hoagland*, 114 U. S. 606; *Missouri P. R. R. District* v. *Bradley*, 164 U. S. 112; *New Orleans Gas Light Co.* v. *Drainage Commissioners*, 197 U. S. 453; *Clark* v. *Nash*, 198 U. S. 370; *Manigault* v. *Springs*, 199 U. S. 473). The statutes in those cases were justified either in view of a policy in force prior to the adoption of the State constitution, or, within a similar principal, by long exercise of legislative power which the State courts had sustained. In New York, however, it was early in the history of that State determined that a general drainage statute (2 Rev. Stat. 458) authorizing the taking of property without the consent of the owner for the purpose of digging ditches was unconstitutional. (*Gilbert* v. *Foote*, cited in *White* v. *White*, 5 Barb. 483, and in *Matter of Ryers*, 72 N. Y. 1). It was declared in contravention of the constitution so that it became necessary to amend the State Constitution in 1894. (Art. 1, Sec. 7, of N. Y. State Constitution.)

Judge Denio, in *People* v. *Smith* (21 N. Y., at page 398), observed that it would not be due process of law to "appropriate the property of

one citizen for the use of another, or confiscate the property of one person or class of persons, or a particular description of property upon some view of public policy, where it could not be said to be taken for a public use.

The Legislature is without power to declare or define "public use." Whether that is a public use, for which property may be taken must always depend upon the object aimed at and whether the plan has such obvious or recognized character of public utility as to justify the exercise of the right of eminent domain. (*Matter of Townsend* 39 N. Y. 171; *Matter of Deansville Cemetery Association*, 66 N. Y. 569; *Matter of Niagara Falls and Whirlpool R. Co.*, 108 N. Y. 375; *Matter of Split Rock Cable Road Co.*, 128 N. Y. 408.)

"Speaking in general terms, I should say that the public must under proper police regulations, have the right to resort to the land or property for the use for which it was acquired, independently of the mere caprice of any private person or corporation in whom the title to the property would vest on condemnation. Otherwise the use could not be public." (Peckham, J., in *Matter of the Mayor*, 135 N. Y. 253, 259.) See also *Matter of Burns*, 155 N. Y. 23, 27.

The construction and interpretation of the phrase "public use" which is given by the highest Court of the State must be accepted by this Court in judging whether the statute conforms to the Constitution of the United States.

In *Missouri Pacific R. Co.* v. *Nebraska* (164 U. S. 403) the Court, at page 414, said:

> "The Supreme Court of Nebraska has construed this statute as authorizing the Board of Transportation to make the order questioned in this case, which required the railroad company to grant to the relators the right to erect an elevator upon its right of way at Elmwood station, on the same terms and conditions on which it had already granted to other persons rights to erect two elevators thereon. The construction so given to the statute by the highest Court of the State must be accepted by this Court in judging whether the statute conforms to the Constitution of the United States. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 456 (33:970, 3 Inters. Com. Rep. 209), *Illinois C. R. Co.* v. *Illinois*, 163 U. S. 142, 152, 41 L. Ed. 107, 110."

These laws do not declare the ownership, operation, and control of tenement and apartment houses a business affected with a public interest. They leave the owner of such property

free to refuse to enter into contract relations with anyone without shelter, who, for his safety and welfare, may be justly entitled to use and occupy an occupied apartment in the possession of the owner upon payment of proper compensation, but it does compel the owner to continue business relations with a wrongful trespasser on his property.

The business affected with a public interest under existing law can only be compelled to enter into contract relations by contracts creating mutual obligation, but these laws only compel business relations with trespassers—the owner is compelled to let the trespasser undisturbed in his possession for a period of twenty-five months, but the trespasser is not obliged to compensate the owner for the twenty-five months, but only for the period of occupancy, permitting the trespasser free to surrender possession at any time.

These laws do not create a uniform standard for the regulation of prices for the use of apartments—a judge is free to fix different compensation for the use of apartments of equal character in the same building. Different owners of buildings of the same character may receive different compensation for apartments in all respects similar in character. There is no attempt to regulate prices to secure the equal protection of the

law but in effect, that right of equal protection of the law guaranteed by the constitution is denied (*Cincinnati S. R. Co.* v. *Snell*, 193 U. S. 30; *Gulf, C. & S. F. Ry.* v. *Ellis*, 165 U. S. 150).

The law takes the property of the owner for private use without securing payment of proper compensation as condition precedent for such use as required by law.

> *Brewster* v. *Roger Co.* (169 N. Y. 73), *Muhlker* v. *N. Y. & H. R. R. Co.* (197 U. S. 567).

In *Brevoort* v *Grace* (53 N. Y. 245), at page 255), at page 255, the Court said:

> "The right of eminent domain or inherent sovereign power gives the Legislature control of private property for public use, and only for such uses; in such cases, the interest of the public is deemed paramount to that of the individual, and yet, even here, the Constitution of the United States and of this State have imposed a salutary check upon the exercise of legislative power for that purpose, by providing that private property shall not be taken for public use without compensation. It follows if the Legislature should pass any act to take private property for a purpose not of a public nature, or if it should provide, through forms to be observed, to take property of one and give it or sell it, which is the same thing in prin-

ciple, to another; or if it should vacate a grant of property under the pretext of some public use, such cases would be gross abuses of the discretion of the Legislature, and the law would be clearly unconstitutional.

If the right exist to take the property of one without his consent and transfer it to another, it may as well be exercised without making compensation as with it, for there is no provision in the constitution that just provision shall be made to the owner when his property shall be taken for private use. The power of making contracts for the sale or disposition of private property for individual owners has not been delegated to the Legislature, or to others * * *" (Italics ours.)

(See also: *People* v. *Fisher*, 190 N. Y. 468; *In re N. Y. Central R. R.*, 77 N. Y. 248; *Onconta Light Co.* v. *Schwartzenbach*, 164 App. Div. (N. Y.) 548; *Ontario Knitting Co.* v. *New York*, 147 App. Div. (N. Y.) 316, affirmed 205 N. Y. 409; *Rome* v. *Whitestone Water Works*, 113 App. Div. (N. Y.) 547, affirmed in 187 N. Y. 542.)

This Court followed the same rule of construction of the Missouri Constitution in *Cole* v. *City of L. Grange* (113 U. S. 1.), where the Court, at page 7, said:

"The express provisions of the Constitution of Missouri tend to the same con-

clusion. It begins with a declaration of rights, the sixteenth article of which declares that no private property ought to be taken or applied to a public use without just compensation. This clearly presupposes that private property cannot be taken for private use. Otherwise, as it makes no provision for compensation except when the use is public, it would permit private property to be taken or appropriated for private use without any compensation whatever."

Long before the adoption of the Fourteenth Amendment, Chief Justice Marshall, in *Fletcher* v. *Peck* (6 Cranch, 87, 135), said:

> "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?
>
> To the Legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of a legislative power, is well worthy of serious reflection.
>
> It is the peculiar province of the Legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would

seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding act (affecting title of property) might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected sovereign power, on whose Legislature no other restrictions are imposed than may be found in its own constitution, she is part of a large empire; she is a member of the American Union; and that Union has a constitution the supremacy of which all acknowledge, and which imposes limits to the Legislature of the several States, which none can claim a right to pass. The Constitution of the United States declares that no State shall pass any bill or attainder, *ex post facto* law or law impairing the obligation of contracts. * * *

Since then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of prop-

erty from the obligation of executing their contracts by conveyances. * * *

Whatever respect might have been felt for the State sovereignities, it is not to be disguised that the framers of the constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State.

The Legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the Legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate?"

(See to the same effect: *Terrett* v. *Taylor*, 9 Cranch 52; *Town of Pawlet* v. *Clark*, 9 Cranch 292; *Dartmouth College* v. *Woodward*, 4 Wheaton 695.)

IV.

CHAPTER 947 OF THE LAWS OF 1920 IN CONJUNCTION WITH CHAPTER 942 AND CHAPTER 951 OF THE LAWS OF 1920, WHICH ARE IN PARI MATERIA, IS UNCONSTITUTIONAL AND VOID SO FAR AS THE SAME AFFECT LEASES MADE BEFORE THESE STATUTES TOOK EFFECT, AS BEING AN ILLEGAL IMPAIRMENT OF THE OBLIGATION OF CONTRACT, CONTRARY TO SECTION 10 OF ARTICLE 1 OF THE CONSTITUTION OF THE UNITED STATES.

Upon the failure of the defendant tenants to surrender possession of the demised premises on September 30, 1920, the plaintiff, as we have shown ante p. 20, had at least five remedies, namely, (1) to treat the tenant as one at will or sufferance, and terminate the tenancy by giving the notice required by statute (unnecessary at common law, *Rackhow* v. *Schanck*, 43 N. Y. 448); or (2) to treat the lease renewed for another year (*Herter* v. *Mullen*, 159 N. Y. 570, 576); or (3) to re-enter and by use of reasonable force eject the occupants; or (4) to maintain the common law action of ejectment; or (5) to sue in trespass for damages.

The law then in force and as declared by the highest judicial tribunals of the State of New York assured to the owner the right to possession on the expiration of the term, and imposed upon the tenant an obligation to surrender on the day when the lease expired; that right could not be taken or the obligation destroyed without due process of law (*Muhlker* v. *N. Y., N. H. & H. R. R.*, 197 U. S. 544, 570; *Barson* v. *Mulligan*, 196 N. Y. 23, 25; *Adams* v. *City of Cohoes*, 127 N. Y. 175, 182.)

For a breach of the covenant to surrender as implied by law the lessor was entitled to recover damages. (*Vernon* v. *Brown*, 40 N. Y. App. Div. 204.)

All of these rights were secured to the plaintiff and its grantors under the common law in force at the time of the adoption of the State and Federal Constitutions.

The rights and remedies to recover possession of the demised premises after the expiration of the lease and to oust the tenant and persons holding over by means of a warrant in summary proceedings or by the execution of a judgment in ejectment are substantive rights, which were a part of the contract without any express agree-

ment between the parties. They were annexed to the contract at the time it was made. (*Bronson* v. *Kinzie*, How. 311; *McCracken* v. *Howard*, 2 How. 608; *Walker* v. *Whitehead*, 16 Wall. 304.)

It cannot be disputed that subsequent laws which in their operation amount to the denial of rights accruing by a prior contract are obnoxious and subject to constitutional objection.

The rule is laid down in *Cooley's Constitutional Limitations* (6 Ed., p. 444) as an elementary principle that a party cannot by his misconduct so forfeit a right that it may be taken from him without judicial proceedings, in which forfeiture shall be declared in due form. Forfeitures of rights in property cannot be adjudged by legislative act, and confiscations without a judicial hearing after due notice would be void as not being due process of law. Yet this is exactly what these innovations in rent legislation undertake to do. The Legislature has declared the right to recover possession of one's property suspended because someone, somewhere, attempted to charge an exorbitant rental. The person applying for the enforcement of the remedy secured to him by the law in force when the contract was made is not permitted to come into court and show that he is there with "clean hands" or that the person holding over is doing

so capriciously. We do not think (to quote the language of Chief Justice Ruger in *Gilman* v. *Tucker*, 128 N. Y. 190, 205) that "it is competent for the Legislature to deny, for any cause, to a party who has been illegally deprived of his property access to the constitutional courts of the State for relief."

We cannot believe that in this country, where it has become a settled principle of law that there can be no legal wrong without a remedy, the people will ever sanction legislative exercise of power to discharge the performance of contractual obligations. "It is the duty of every State to provide, in the administration of justice, for the redress of private wrongs." (*Missouri Pac. R. R.* v. *Humes*, 115 U. S. 512, 521.) This duty cannot be discharged by legislation which compels owners of property to leave persons holding over in undisturbed possession on condition that the "fair and reasonable" rent is paid.

This legislation violated the compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good and "that every man may, at all times, find his security in them." (Preamble to Constitution of Massachusetts.) It is a violation of the obliga-

tion of contract subsisting between citizen and State that they shall have a remedy for every legal wrong; "that every subject • • • for injury done him *in bonis terris, vel persona*, by another subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done him, freely without sale, fully without delay." (1 Black. Comm., Chase's ed. 141.) The obligation of this contract is equally sacred with all other contracts and "those rules of construction," says Chief Justice Marshall in *Sturges* v. *Crowninshield* (4 Wheat. 206), "which have been consecrated by the wisdom of ages, compels us to say that those words (Sect. 10, Art. 1, U. S. Constitution) prohibit the passage of any law discharging a contract without performance."

Statutes affecting remedies which do not impair the obligation of contract may be constitutionally valid, providing a reasonable time is allowed for bringing an action or proceeding or performing an act for their passage and before a change or repeal of the remedy takes effect. (Cooley on Constitutional Limitations, 6th Ed., page 431; *Wheeler* v. *Jackson*, 137 U. S. 245; *Antoni* v. *Greenhow*, 107 U. S. 769.) Usury has been re-

garded with abhorrence from the earliest times, and yet any law declaring a transaction illegal because of usury, which was legal when made, would be constitutionally void. (*Sturges* v. *Crowninshield, supra*).

This principle of constitutionality was recognized by the New York Court of Appeals sustaining the constitutionality of the Act of 1846 abolishing distress for non payment of rent upon the ground that the legislature had provided a remedy equally efficient, securing to the lessor the remedy to sue and recover all rents due and to become due after the enactment of said law abolishing distress. (*Van Rensellaer* v. *Snyder*, 13 N. Y. 299; *Conkey* v. *Hart*, 14 N. Y. 22.)

In *U. S.* v. *Quincy* (4 Wall. 535), at page 552 this Court said:

> "Nothing can be more material to an obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall with the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against invasion. • • • It is competent for the

> States to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired."

But by this legislation, which it is said was enacted to provide for a remedy, the owner is denied a remedy to recover the possession of his property withheld from him by persons admitting that their possession is not held adverse to him. These laws do more—they clog not only the right to recovery of such possession, but also the right to recover the rent voluntarily agreed upon by the contracts in force when these laws were enacted.

Laws of this character have been condemned in the early history of this country. (*Green* v. *Biddle*, 8 Wheaton 1.) In VI Columbia Law Review 262, 263 it is stated:

> "The doctrine of the United States Supreme Court enunciated in *Green* v. *Biddle* (1823), 8 Wheaton 1, adopted in *Bronson* v. *Kinzie* (1843), 1 How. 311, that the constitutional provision 'no State shall • • • pass any • • • law impairing the obligation of contracts' is clearly violated by a law which diminishes the remedy for breach as by a law which changes the terms of the contract, has been repeatedly reaffirmed. The remedy at the

> time of its inception is considered a part of the contract, and any statute giving total or partial immunity for a breach by diminishing the duty of performance, thereby impairs the obligation. (*McCracken* v. *Hayward* (1844), 2 How. 608, 612.)"

This Court has reaffirmed the doctrine enunciated in *Green* v. *Biddle*, *supra*, in the following cases:

Planters Bank v. *Sharp* (1848), 6 How. 301, where the right of a bank to collect notes was impaired; in *Edwards* v. *Kearzey* (1877), 96 U. S. 601, 604, where the statute increasing the amount of property exempt from execution was declared invalid against debts previously contracted; in *Barnitz* v. *Beverly* (1895), 163 U. S. 123, declaring unconstitutional a statute in so far as it affected mortgages executed prior to its enactment, which statute changed the remedy of redemption; in *Bedford* v. *Eastern Building Loan Assn.* (1900), 181 U. S. 227, holding that the issuance of a certificate of stock to a member of a foreign loan association and his application for a loan made before the passage of a statute restricting the right of the association to do business in the State constituted a contract obligation which could not be impaired by such statute; in *Bradley* v. *Lightcap* (1904), 195 U. S. 1, which also held

unconstitutional a statute changing the redemption laws as they existed at the time of the execution of the mortgage in question.

The Soldiers' and Sailors' Act referred to in the brief of counsel for the defendants was enacted as a protection to soldiers and sailors in the service of the United States Government, so that their property might not be taken without due process at a time when, because of the war, they were not in a position to defend themselves in actions or proceedings brought for the enforcement of contract obligations. But in the instant case it cannot be said that these laws were enacted for any other purpose than to take the property from one and give it to another, without judicial process.

When the parties entered into the lease for the occupation of the premises by the defendants it was their understanding and agreement not only that the lessor should have as good a remedy as that provided by the terms of the contract when made, but that his remedy should be by means of summary proceedings provided for by the statute then in force, or some other remedy just as speedy and equally efficacious.

If it was the purpose of the Legislature to change the remedy of summary proceedings or

to abolish that remedy altogether, it was also its duty to provide a new remedy affording to landlords a means as efficient for the enforcement of the contract as that of the remedies abolished. (*Louisiana Ex rel Range* v. *New Orleans*, 102 U. S. 203; *Louisiana* v. *Pittsburg*, 105 U. S. 301; *Louisiana* v. *Jumel*, 107 U. S. 750; *Grantly* v. *Ewing*, 3 How. 707; *Louisiana Ex rel Nelso* v. *St. Martin's Parish*, 111 U. S. 716; *King* v. *Missouri*, 107 U. S. 221.)

In *McGahey* v. *State of Virginia* (135 U. S. 662), at page 690, this Court said:

> "On this subject we think there can be little doubt. It is well settled by the adjudication of this Court that the obligation of a contract is impaired in the sense of the Constitution, by any act which prevents its enforcement, which materially abridges the remedy for enforcing it which existed at the time it was contracted, and does not supply an alternative remedy equally adequate and efficacious."

V.

CHAPTERS 944, 945, 947, 951 ARE, AND EACH OF THEM IS, VOID BECAUSE THEY DEPRIVE THE OWNERS OF PRIVATE PROPERTY OF ALL RIGHTS AND REMEDIES WHICH ARE ESSENTIAL TO THE EXISTENCE OF OWNERSHIP, THEREBY VIOLATING THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, SECTION 6, OF THE CONSTITUTION OF THE STATE OF NEW YORK.

The Joint Legislative Committee of the New York State Legislature frankly, avowed that it was the purpose and intent of these laws to suspend until November, 1922, each and every known remedy, whether common-law or statutory, whereby the owners of dwelling houses in metropolitan districts could repossess themselves of their property. By depriving landlords such as the plaintiff herein of all remedies by means of which it could repossess itself of its property, the right of ownership, although not directly destroyed, is so impaired, that it deprives the owner of property of all of its principle attributes

—it takes the property from the owner without his consent and transfers it to others against his will; it creates an encumbrance on the property without the consent of the owner which affects its marketability. This constitutes a deprivation by the State of the plaintiff's property without "due process of law" and is contrary to and in violation of the 14th Amendment to the Federal Constitution as well as to Article 1, Section 6 of the Constitution of the State of New York, which provides that no person shall be deprived of property without due process of law.

The Legislature, in the language of the eminent counsel for the Joint Legislative Committee "recognizes the right of the tenant to a continuance of his lease". In other words, the lease which encumbered the plaintiff's property prior to September 30, 1920, and which, by its terms, would have terminated the encumbrance at the expiration of the term (*Neagel* v. *Hudson,* 114 N. Y. Supp., affirmed in 165 N. Y. App. Div. 943), was extended so that the possession of such occupant is placed in the same category as that of lessees, who, by express contract with

the owner, have acquired an extension of the term of the demise. The situation thus created does not only deprive the owner of its property and affect its marketability, but it also subjects the plaintiff in this case to liability for damages for its failure to give possession of the demised premises to Goldsmith (the new lessee) in accordance with the terms of the lease entered into long before this rent legislation was contemplated. The trespasser is given a title paramount to that of the owner.

The case of *Green* v. *Biddle* (8 Wheaton 1), seems to have been twice argued. On the first argument, reported on page 1, the opinion was written by Mr. Justice Story. On the re-argument Mr. Justice Washington delivered the opinion of the Court. It seems that the State of Virginia had exercised jurisdiction over what subsequently became the State of Kentucky, prior to the 18th day of December, 1789. On that date the State of Kentucky came into existence and the legislature of Virginia passed an act which declared that all private rights and interest in lands within the said district (Kentucky) derived from the Laws of Virginia prior to such

separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws then existing in said State (Virginia). This compact was ratified by the Convention which framed the Constitution of Kentucky, and incorporated into that Constitution as one of its fundamental articles. Subsequently the legislature of the State of Kentucky passed a law which provided that the occupant of land from which he is evicted by paramount title shall, in all cases, be excused from the payment of rents and profits accrued prior to the actual notice of the adverse title, provided his possession in its inception was peaceable and he showed a plain and connected title deduced from some record; and second, that the successful claimant was liable to a judgment against him for all valuable and lasting improvements made on the land prior to the assertion of the adverse title.

In that case the rights and obligations which go with the ownership of land were not based upon contract between the parties, but upon the contract resulting from the compact between the State of Virginia and the State of Kentucky

which provided that all laws prior to such separation should remain valid and secure under the laws of the proposed State and should be determined by the laws at that time existing in Virginia. After referring to the laws enacted by the State of Kentucky, the Court, discussing the Statutes of 1797 and 1812, on page 15, says:

> "From this summary of the principal provisions of the Acts of 1797 and 1812, it is apparent that they materially impair the rights and interests of the rightful owner in the land itself. They are parts of a system, the object of which is to compel the rightful owner to relinquish his lands, or pay for all lasting improvements made upon them without his consent or default; and in many cases those improvements may greatly exceed the original cost and value of the lands in his hands. No judgment can be executed, and no possession obtained for the lands, unless upon the terms of complying with the requisitions of the acts. * * * It requires no reasoning to show, that such laws necessarily diminish the beneficial interests of the rightful owner in the lands."

And at page 16, the Court says:

> "If the legislature of Kentucky had declared by law that no person should recover lands in this predicament, unless upon payment, by the owner of a moiety, or of the whole or their value, it would be obvious that the former rights and interests of the owner would be completely

extinguished *pro tanto*. If it had further provided, that he should be compelled to sell, without his own consent, at a price to be fixed by others it would hardly be doubted that such laws were a violation of the compact. These cases may seem strong; but they differ not in the *nature*, but in the *degree* only of the wrong inflicted on the innocent owner. He is no more bound by the laws of Virginia to pay for improvements, which he has not authorized, which he may not want, or which he may deem useless, than he is to pay a sum to a stranger for the liberty of possessing and using his own property, according to the rights and interests secured to him by those laws. It is no answer, that the acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies, as materially to impair the rights and interests of the owner, they are just as much a violation of the compact, as if they directly overturned his rights and interests."

Upon the reargument of that case, the Court at page 74 comments on the common law of England which secures to the lawful owner of land the right to enter upon it when the possession of it is withheld from him; to recover possession by suit; to retain possession, and to receive the issues and profits arising from it, and then continues at page 75:

"Nothing, in short, can be more clear, upon principles of law and reason, than

that a law which denies to the owner of land a remedy to recover possession of it, when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. *If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged, but it is impaired, and rendered insecure, according to the nature and extent of such restrictions.*

A right to land essentially implies a right to the profits accruing from it, since, without the latter, the former can be of no value." (Italics ours.)

As previously stated, this Court has never departed from the rule laid down in *Green* v. *Biddle* (*supra*).

The legislation under consideration also falls within the inhibition of the 14th Amendment to the Federal Constitution, which provides "That no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States or shall any State

deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *Lochner* v. *New York* (198 U. S. 45, at page 53) this Court said:

> "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Under that provision no State can deprive any person of life, liberty or property without due process of law."

Counsel for the defendants place great reliance upon the decision of this Court in the case of *German Alliance Insurance Co.* v. *Lewis, etc., of Kansas* (233 U. S. 389). It is contended that "the public interest which warrants the regulation of such ordinary, private, competitive and unfranchised businesses as grain elevating, fire insurance, laundrying, bread baking, etc., is incomparably smaller than that which underlies the exertion of the legislative power over the business of renting apartments and houses for dwelling purposes in densely populated cities in this State." After referring to the case of *Mobile* v. *Yuille*, 3 Ala. N. S. 140; *Louisiana Bread*

Case, 12 La. Ann. 432, where the Court sustained an ordinance regulating bakers, prescribing the weight of loaves of bread and fixing the prices at which they should be sold on the ground that where a great number of persons are collected together in a town or city a regular supply of wholesome bread is of the utmost importance, it is further urged that "if that was a sufficient public interest to justify the regulation of bakers in ordinary times, how is it possible to deny the right of the State to regulate dwelling house owners in these times of severe shortage of housing and emergency?" "Certainly," they say, "where a great number of persons are collected together in a town or city like New York, an adequate supply of housing is a matter of the utmost importance." They urge if tenement and apartment house dwellers may all be evicted by landlords, by far the largest power of the population of the city may be dispersed in spite of the city, the State, and the people themselves." Counsel then suggests that since "the business of renting private dwellings is no more sacred than the right to engage in the business of renting storage space in grain elevators, that therefore, under appropriate circumstances, either may lawfully be laid under necessary compulsions in the public interest."

But counsel for the defendants apparently overlook that in all of these cases upon which they rely the control of the property was left entirely to the owner engaged in the particular business.

In the case of *German Alliance Insurance Co. v. Lewis, etc., Kansas* (*supra*), Mr. Justice McKenna points out that the business of insurance is "*essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times,*—certainly the sense of the modern world,—is of the greatest public concern. *It is therefore within the principle we have announced.* • • • *The principle we apply is definite and old,* and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become 'clothed with a public interest,' and therefore subject 'to be controlled by the public for the common good.'" (Italics ours.) The Court made it quite plain that insurance was not a private business and, at page 416, says:

> "How can it be said to have the privilege of a private business when its dividends are restricted, its investments controlled,

> the form and extent of its contracts prescribed, discriminations in its rates denied, and a limitation upon its risks imposed?
>
> * * *
>
> We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose, and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that 'it is illusory to speak of a liberty of contract.'"

In the instant case we are not concerned with regulations. The Legislature made no attempt to regulate renting prices. The owner is left entirely undisturbed in the management and conduct of his business except that he is told that he may not have possession of his property if it happens to be in the possession of a trespasser. The owner of dwellings is not compelled to turn over his property for public or private use. What the Legislature did was merely to confer upon the trespasser a title paramount to that of the owner for a period of two years.

Depriving the owner of property of one of its essential attributes is depriving him of his

property within the constitutional prohibition. (*People* v. *Manhattan Savings Institution*, 90 N. Y. 48; *Brown* v. *New Jersey*, 175 U. S. 172; *Ex Parte Rigel*, 114 U. S. 642; *Iowa, &c., Co.* v. *Iowa*, 160 U. S. 389; *Chicago, &c., R. R. Co.* v. *Chicago*, 166 U. S. 226.)

In the case of *Ochoa* v. *Hernandez Y Morales* (230 U. S. 139, 161) the Court said:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

The rights and remedies existing at the time when the several leases set forth in the Bill of Complaint herein were made and entered into, as recognized by the decisions of the highest court of this State, constitute an obligation of the contracts and the measure of the rights of the

parties under them. These contract rights include the right to summary proceedings and to ejectment. By destroying these remedies, without providing a substantial equivalent, the plaintiff's property was taken in violation of the provisions of the 14th Amendment to the Federal Constitution.

For the purpose of determining the 'due process' clause in the Constitution, this Court will consider the question with the laws existing at the time the State came into being. This principle is illustrated by the case of *Muhlker* v. *N. Y., N. H. & H. R. R.*, 197 U. S. 544, 570, where the Court said:

> "When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.
>
> And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away

rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of State decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different, or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate."

Therefore, the principle cited in *Atlantic Coast Co.* v. *Goldsboro* (232 U. S. 548) is not a criterion in the instant case. In that case this Court sustained a municipal ordinance compelling the railroad to stop the operation of its trains in congested streets because that ordinance was in accordance with the established public policy and customs of the State of New Jersey. But in determining the validity of a similar statute

under the laws of the State of New York, such construction would be impossible. (See *New York* v. *Pine*, 185 U. S. 93.)

If the due process and contract clauses contained in the State and Federal Constitutions are to have any restraining power over the Legislature, the case at bar is one to which such power should be applied. As Mr. Justice Story, speaking for this Court in the case of *Wilkinson* v. *Leland* (2 Peters 627), said:

> "We know of no case in which a legislative Act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State of the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced."

See to the same effect *Emburry* v. *Connor* (3 N. Y. 511); *Hopper* v. *Britt* (203 N. Y. 144, 149); *Cotting* v. *Kansas City Stock Yards* (183 U. S. 87, 91, 94 and 105); *Reagan* v. *Farmers Loan & Trust Co.* (154 U. S. 362.)

Chapter 947 of the Laws of 1920 and kindred legislation enacted simultaneously must be considered *in pari materia*.

Assuming, *arguendo*, that which we emphatically deny, namely, that the leasing of dwelling houses and apartments is a business charged with a public use, the legislation is, nevertheless, unconstitutional because it inhibits and prohibits the owner's power to recover the possession of said property by attempting to bar the owner's privilege and right from withdrawing his property from the public use (if any such exists). This is clearly contrary to the owner's constitutional rights.

In *Munn* v. *Illinois* (94 U. S. 113), cited by counsel for defendant, this Court at page 133 said:

> "There is no attempt to compel these owners to grant the public an interest in their property (grain warehouses) but to declare their obligations, if they use it in this particular manner."

Again the Court said at page 126:

> "He (the owner of grain elevators) may withdraw his grant by discontinuing the use."

Language substantially identical was used by this Court in *Budd* v. *New York*, 143 U. S. 517, 536.

In the present instance, the Legislature has forbidden the owner from discontinuing the busi-

ness. It compels him to continue the business with persons with whom he does not desire to deal.

The owner's intentions cannot possibly be determined as to whether he desires or does not desire to continue the business of renting dwelling houses until the possession of his property is restored to him.

In conclusion under this point, the Court's attention is respectfully directed to the fact that the qualifying restrictions contained in the acts passed at the regular session which took effect April 1st, 1920 (Chapter 137, Section 4), requiring that the tenant, when applying for a stay, must show that he could not secure a suitable apartment for himself and his family similar to that occupied by him, that he has used due and reasonable efforts to secure such apartment and that his application for a stay is made in good faith, have now been entirely omitted. The fact is that in this case we have shown that the tenant, by the exercise of ordinary diligence, could have secured for himself suitable premises; that he failed to do so insisting upon his statutory right to remain in the possession of the premises against the will of the owner.

VI.

THESE LAWS ARE ALSO UNCONSTITUTIONAL BECAUSE THEY VIOLATE THE GUARANTY OF THE EQUAL PROTECTION OF THE LAWS IN DISREGARD OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

In defining the protection given by the 14th Amendment "that no State shall deny to any person within its jurisdiction the equal protection of the laws" this Court, in the case of *Connolly* v. *Union Sewer Pipe Co.* (184 U. S. 540), at pages 558, 559, said:

> "The State has undoubtedly the power by proper legislation to protect the public morals, the public health, and the public safety, but if by very necessary operation its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. * * * But upon this general question we have said that the guaranty of the equal protection of the law means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances.'"

Equality of protection implies not merely equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like position from charges and liability of any kind. The State has, no doubt, the power to prescribe regulations for the health, good order and safety of society, and to adopt such measures as will advance its interest and prosperity, but in the purchase and sale of commodities of general use, persons must be left to exercise their own good sense and judgment. The 14th Amendment to the Constitution requires that all legislation shall treat alike all persons brought under subjection to it.

The "Housing Laws" do not repeal the remedy of summary proceedings, nor is the statute relating to actions of ejectment repealed. By this legislation, the operation of these laws is suspended for the benefit of the general class of tenants occupying apartments, but the right to these remedies is not denied to every landowner. The right to maintain summary proceedings and actions of ejectment is still reserved to that class of landowners who may desire to destroy their buildings for the purpose of erecting new buildings, to those desiring the premises for per-

sonal occupancy and to owners of office, factory or other buildings occupied for business purposes and to owners of hotel property.

It is also reserved without limitation to every owner of property in cities of the third class and in some instances to the owners of property in cities of the second class.

It leaves the remedies of ejectment and summary proceedings undisturbed for the benefit of owners of buildings now in the course of construction or which may hereafter be erected, while it deprives owners of existing buildings of all remedies for the recovery of possession of their property withheld from them by persons trespassing upon their property. The housing conditions and congestion prevail all over the country and in every city in the State of New York. The rents have been increased in every city in the United States, and such increase has not been in greater proportion to the general increase in prices of other commodities; therefore, there was no reasonable ground for singling out one class of property consisting of real estate improved prior to the enactment of these laws and to make the law applicable to cities of the first class and not to other cities, nor is there any good ground for depriving owners of property in the City of New York of the right of action in ejectment or

the right to summary proceedings which are still enjoyed by citizens who are not owners of existing apartment houses but are landlords nevertheless. There is no reasonable ground for the exceptions in these laws, consequently this legislation must be deemed repugnant to the Constitutional provisions guaranteeing equal protection of the laws. (*Hines* v. *Claredon, Levee Dist. Co.*, 204 Fed Rep. 133; *People* v. *Meusching*, 187 N. Y. 8; *Holden* v. *James*, 11 Mass. 396, 405; *New York Sanitary Utilization Co.* v. *Dept. of Public Health*, 32 N. Y. Misc. Rep. 577, affd. 61 N. Y. App. Div. 106; *Dobbins* v. *Los Angeles*, 195 U. S. 237.)

The right to bring an action for the vindication of a legal right or redress of a legal wrong is properly within the sense of the clause of the Constitution which guarantees each citizen the equal protection of the laws. (*Brewster* v. *J. & J. Rogers*, 169 N. Y. 73; *Levy* v. *Dunn*, 160 N. Y. 504; *Gilbert* v. *Ackerman*, 159 N. Y. 118; *Chamber* v. *Chamber*, 61 N. Y. App. Div. 299; *Williams* v. *Village of Portchester*, 72 N. Y. App. Div. 505.)

It is also to be observed that these laws apply a different rule in those portions of the State of

New York outside of the City of New York. This cannot be justified and is obnoxious to the constitutional amendment. (*Santa Clara Co.* v. *Southern Pacific Railroad*, 118 U. S. 394; *Hines* v. *Clarendon, etc., Co.*, 204 Fed. Rep. 133.)

Assuming, but not conceding, that under the police power of the State, it has the power, directly or indirectly, to subsidize new buildings either by cash payments or by remission of taxes, it has no power to discriminate between the owners of buildings in existence and the owners of buildings erected subsequent to a specified time. It may not permit one to exact unlimited compensation for the use of his property newly erected and dictate to the owner of the older building adjacent thereto that he must submit his contracts for the examination of some judicial magistrate who, for some reason or another, may determine that the stipulated rent agreed upon is unreasonable. (*Merchants & Manufacturers Nat. Bk.* v. *Pa.*, 167 U. S. 461, 463; *Cotting* v. *Kansas*, 183 U. S. 79, 112.)

VII.

THE "HOUSING LEGISLATION" UNDER CONSIDERATION CREATES "INVOLUNTARY SERVITUDE," PROHIBITED BY THE THIRTEENTH AMENDMENT OF THE CONSTITUTION.

Chapter 951 of the Laws of New York, 1920, standing alone might not be objectionable. It might be justified on the ground that it was intended as a remedy for the protection and preservation of the health and comfort of tenants occupying apartments under leases voluntarily made, orally or in writing, expressed by the words of the parties or implied from their action and conduct.

This statute reads:

> "An act to amend the penal law, in relation to wilful violation of the terms of a lease.
>
> Section 1. Section two thousand and forty of the penal law is hereby amended to read as follows:
>
> 'Section 2040. Wilful violation of the terms of a lease. Any lessor, agent, manager, superintendent or janitor of any building, or part thereof, the lease or rental agreement whereof by its terms,

> express or implied, requires the furnishing of hot or cold water, heat, light, power, elevator service, telephone or any other service or facility to any occupant of said building, who wilfully or intentionally fails to furnish such water, heat, light, power, elevator service, telephone service or other service or facility at any time when the same are necessary to the proper or customary use of such building, or part thereof, or any lessor, agent, manager, superintendent or janitor who wilfully and intentionally interferes with the quiet enjoyment of the leased premises by such occupant, is guilty of a misdemeanor.
>
> "Section 2. This act shall take effect immediately."

Here the Legislature has declared property owners must against their will render services to persons declared to be "statutory tenants," but who are in fact and by law mere trespassers.

New offenses not before known may be created or common law definitions of particular offenses extended so as to include acts not punishable under the common law and not embraced within the common law definition of offense, but that is subject to the limitation that no State may pass a law that makes an act done before the passage of the law, and which was innocent when done criminal and punish such act. (*Calder* v. *Bull*, 3 Dall. 386, 390.)

The Legislature has practically made out of landlord's "peons," persons subject to compulsory service, who must serve "statutory tenants" in possession of their property against their will and consent. In *Clyatt* v. *United States* (197 U. S. 207, 216) Mr. Justice Brewer, who delivered the opinion of the Court, after referring to the 13th Amendment, said:

> "This amendment denounces a status or condition irrespective of the manner or authority by which it is created."

This new legislation in effect declared a suspension for a period of two years of every landowner's civil rights guaranteed to him by the State Constitution as well as by the Constitution of the United States, which secure to him the liberty to refuse business relations with any one with whom he can make contract. Similar legislation has been condemned by this Court.

In *Adair* v. *United States* (208 U. S. 161, 173) this Court held unconstitutional a statute forbidding discrimination against members of labor unions, and in *People* v. *Marcus* (185 N. Y. 257) a similar statute was declared repugnant to the New York State Constitution. More recently this Court in *Bailey* v. *Alabama* (211 U. S. 452) declared unconstitutional a penal statute which

made it a crime for an employee to refuse to perform services which he was bound to perform under a contract voluntarily made, on account of which the employee received advance payment which he failed and refused to refund.

If the statute in question stood alone it might be construed as a preventive measure against wrongful misconduct by landlords in their relation to their tenants, a relation not implied by legislative enactment, but implied in accordance with settled principles of law governing contracts generally. "A contract cannot be implied in fact where the facts are inconsistent with its existence; or against the declaration of the party to be charged." (*Miller* v. *Schloss,* 218 N. Y. 400, 406.)

In the class of cases where the law prescribes the liability of persons who have not in reality entered into contract relations, the circumstances are usually such as to make it just that one should have the right, and the other should be subject to liability similar to the rights and liabilities in certain cases of express contract. But in all such cases the *question of liability is one for judicial determination depending on the circumstances of each case.* It is based on the principle of the law which holds that no citizen can lawfully do that which has a tendency to be

injurious to an individual, to the public, or is against public good. It is the same principle by which freedom of contract or private dealings is restricted by law for the good of the community, the principle of law which protects and develops rather than creates private rights by the imposition of wholesome restraints upon their exercise. The law of torts and our equity jurisprudence are based upon these fundamental principles. The basic principles for the ancient laws, as of the modern laws, is that every individual may do as he pleases with his own, but with due regard to the rights of others. By the adoption of the Constitution, these inherent rights of government were not taken away or limited. The Constitution provided safeguards against the abuse of that power.

No "emergency" can justify an exercise of legislative power to compel one man to render involuntary service to another. As said by this Court in *ex parte Mulligan* (4 Wall. 2, 18, Law ed. 281):

> "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought

to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.*" (Italics ours.)

VIII.

THE PLAINTIFF, UPON THE CONCEDED FACTS, PRESENTS A CASE REQUIRING THAT EQUITY COMPEL OBEDIENCE TO THE CONSTITUTION.

The only claim of the defendants to a right to possession of plaintiff's property is based upon the alleged rights created for their benefit by the several acts of the Legislature. The defendants make no claim to an adverse title by virtue of a conveyance or other instrument executed by any one at any time in possession of this property under color of title. The right to possession of the defendants, if any, is based solely upon legislative authority which is, as we contend, in conflict with the organic law. No issue of fact has been raised. If the laws upon which the defendants rely are constitutionally invalid, the plaintiff is entitled to a judgment or decree granting either legal or equitable relief—whichever will afford the plaintiff adequate and complete relief.

The plaintiff, upon showing that the defendants rely for their only defense upon statutes of doubtful validity, presents a proper case for the determination of that question under the Federal Constitution. (*Cohens* v. *Virginia*, 6 Wheaton

264; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 40; *Mayor* v. *Cooper*, 6 Wall. 253.) If, therefore, the defendants failed to show a complete defense, the District Court could not have refused injunctive relief as demanded by the plaintiff on the ground of equitable discretion as it might do in suits for specific performance or rescission or other causes involving no special constitutional or statutory right of such nature as to be incapable of enforcement otherwise than by injunction. (*Bass* v. *Met. U. S. El. R. R. Co.*, 82 Fed. Rep. 857.)

Lewis in his work on Eminent Domain, Vol. 2 (3rd Ed.), p. 902, says:

> "A court of equity will intervene to compel obedience to a constitution. The owner of land has the right to say that unless they keep within the strict limits provided by law they shall not disturb him in his possession and enjoyment of his property. The power is capable of abuse, and those who are vested with it are often so prone to its arbitrary and oppressive exercise, *that a court of equity without inquiry whether there is irreparable damage or injury not susceptible of adequate legal redress will intervene for protection.*" (See *Angle* v. *Chicago, St. P., Minn., &c., R. R.*, 151 U. S. 1.)

Our contention that a mandatory injunction is the proper relief under the circumstances dis-

closed by the bill of complaint herein is sustained by the decision of this Court in *Lancaster* v. *Kathleen Oil Co.* (241 U. S. 553, 555).

The question of plaintiff's loss in dollars is not so important as is its right to have illegal interference with its vested property rights restrained. "If such value is in any case a question of law which the Court may determine, the smallness of value does not justify a seizure of the fee without due and lawful authority or its destruction by indirect rulings. No invasion of the property rights of a citizen can safely be deemed trifling." (See *Robert* v. *Sadler*, 104 N. Y. 229, 234.)

In *Guffey* v. *Smith*, 237 U. S. 115, 118, the Court said:

> "By the legislation of Congress and repeated decisions of this Court it has long been settled that the remedies afforded and modes of proceeding pursued in the Federal Courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting. Rev. Stat. sects. 913, 917, Comp. Stat. 1913, sects. 1536, 1543; *Neves* v. *Scott*, 13 How. 268, 272, 14 Law Ed. 140, 142; *Payne* v. *Hook*, 7 Wall. 425, 430, 19 L. ed. 260, 261; *Dodge* v. *Tulleys*, 144 U. S. 451, 457, 36 L. ed. 501, 503; *Mississippi Mills* v. *Cohn*,

> 150 U. S. 202, 204, 37 L. ed. 1052, 1053, 14 Sup. Ct. Rep. 75. * * * Rightly understood, this is not a suit for specific performance. Its purpose is not to enforce an executory contract to give a lease, or even to enforce an executory promise in a lease already given, but to protect a present vested leasehold, amounting to a freehold interest, from continuing irreparable injury calculated to accomplish its practical destruction. The complaint is not that performance of some promised act is being withheld or refused, but that complainant's vested freehold right is being wrongfully violated and impaired in a way which calls for preventive relief."

In *Wheelock* v. *Noonan*, 108 N. Y. 179, the defendant by complainant's permission occupied the latter's land by placing thereon rocks and boulders which he failed and refused to remove after the expiration of the time during which such occupancy was permitted. It was contended on behalf of the defendant that a court of equity has no power to grant a mandatory injunction to compel the defendant to remove these rocks and boulders for the reason that the damages suffered by the plaintiff could be adequately measured, and that equity will not restrain a trespass, and also that the plaintiff had an adequate remedy at law to recover the cost and expense which he might be put to by the removal

of these rocks and boulders from the premises. But the Court brushed aside these contentions and held that it was not the duty of the plaintiff to remove these rocks and boulders and sue to recover the expense of such removal from the defendant. (*Beach* v. *Crane*, 2 N. Y. 86.) Passing upon the proposition that the plaintiff could sue at law for the trespass, the Court at page 185 said:

> "The case of *Uliac* v. *New York Central & Hudson River Railroad Co.* (101 N. Y. 98) demonstrates upon abundant authority that in such action (to recover damages for trespass) only the damages to its date could be recovered, and for the subsequent continuance of the trespass, new actions following on in succession would have to be maintained. But in a case like the present would that be an adequate remedy? In each action the damages could not easily be any more than the fair rental value of the lot. It is difficult to see what other damages could be allowed, not because they would not exist, but because they would be quite uncertain in amount and possibly somewhat speculative in their character. The defendant, therefore, might pay those damages and continue his occupation, and, if there were no other adequate remedy, defiantly continue such occupation, and in spite of his wrong make himself, in effect, a tenant who could not be dispossessed. The wrong in every such case

is a continued unlawful occupation and any remedy which does not or may not end it is not adequate to redress the injury or restore the injured party to his rights. * * *

For reasons of this character it has very often been held that while ordinarily courts of equity will not wield their power merely to redress a trespass, yet they will interfere under peculiar circumstances, and have often done so where the trespass was a continuing one, and a multiplicity of suits at law was involved in the legal remedy. The doctrine was recognized and the authorities cited in the *Murdoch* case (73 N. Y. 579), and the rule deemed perfectly settled.

That case and those referred to, it is true, were cases of intrusion where no consent had been given for the entry of the intruder, but whether the trespass was such from the beginning or became one after a revocation of the license, can make no difference as it respects the adequacy of the legal remedy."

The case cited was approved by the New York Court of Appeals in the later case of *Hyman* v. *Biggs*, 223 N. Y. 118; *Hahl* v. *Sugo*, 169 N. Y. 107, 117. See to the same effect *Fox* v. *Fitzsimmons*, 29 Hun, 574, 100 N. Y. 618; *Robert* v. *Sadler*, 104 N. Y. 233; *Archer* v. *Greenville Sand & Grav. Co.*, 233 U. S. 60, 58; *Coatsworth* v. *Lehigh V. R. R.*, 156 N. Y. 457; *Pittsburgh, &c.,*

R. R. v. *Fiske*, 123 Fed. Rep. 760; *Murphy* v. *Lincoln*, 63 Vt. 278; *Griffith* v. *Hilliard*, 64 Vt. 643; *N. Y., N. H. & H. R. R. Co.* v. *Scoville*, 71 Conn., 136; *S. P. R. R. Co.* v. *City of Oakland*, 58 Fed. R. 50.

Where the title is not disputed an injunction will issue against a trespass without proof of threatened waste. It was so held by Chancellor Kent in *Livingston* v. *Livingston*, 6 Johns. Ch. 497, 500, where he said:

> "I can safely allow the injunction in the present case, without going to the extent in the latter cases, or following the habit, as Lord Eldon termed it, in *Field* v. *Beaumont* (1 Swanton 208), of the English Chancery in granting injunctions in cases of trespass as well as of waste."

High in his work on Injunctions (3d Ed., Sec. 697) says:

> "The jurisdiction (to issue a mandatory injunction) may now, however, be regarded as well established, although it is still sparingly exercised, being confined to cases where from the peculiar nature of the property affected by the trespass or from its frequent repetition the injury sustained cannot be remedied by an action for damages, where it may, therefore, be properly termed irreparable. The foundation of the jurisdiction rests in the probability of

> irreparable injury the inadequacy of pecuniary compensation and the prevention of a multiplicity of suits * * *."

It is a settled principle of equity jurisprudence that if a remedy at law be doubtful, a court of equity will not decline cognizance of the suit, and that where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law. This is an established rule in the Federal courts where a remedy at law to exclude Federal equity jurisdiction must be complete in itself and exist in the Federal court. *Davis* v. *Wakelee*, 156 U. S., 688; *Union Pacific R. R.* v. *Weld Co.*, 247 U. S., 282, 287; *Franklin* v. *Nevada Cal. Power Co.*, 264 Fed. Rep., 643; *McConihay* v. *Wright*, 121 U. S., 201.

As to the defendant, Edward Swann, District Attorney of the County of New York, he has made no answer and admits all of the allegations of the complaint, which shew:

> "And your orator further shows that by Chapter 951 of the Laws of the State of New York enacted by the said State Legislature during the year 1920, described in Exhibit 'A' and made part of this bill, it is the duty of the defendant Edward Swann as District Attorney of the County of

New York, to prosecute the complainant and every other owner of property in the City of New York should your orator or any other owner refuse to furnish heat, hot or cold water, light, power, elevator service, telephone service, or any other service or facility to the defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz or to any other occupant of the said building, and for interfering with the quiet enjoyment of the premises so occupied by the said defendants and any other occupant of said building, although such occupancy is without any contract or agreement made by this, your orator, or its predecessor in title, and although the occupancy of said premises by the said defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz and other persons now in possession of the premises owned by your complainant as aforesaid is without its consent and against its will, and that should the said defendant District Attorney in the performance of the duties of his office institute proceedings for the prosecution of this complainant, its agents and servants in accordance with the provisions of the said laws enacted contrary to and in contravention of the Constitution of the United States of America and the said Civil Rights Act hereinabove mentioned, your orator and its agents and servants would be subjected to numerous penalties, fines and sentences for each and every separate act committed

or done by your orator, its agents or servants which in any way would amount to an interference with the use and enjoyment of your orator's property by persons wrongfully occupying the same, and that such penalties and fines, besides the possible imprisonment of the officers, agents and servants of your orator, would be large and numerous and exceed the sum of Three Thousand ($3,000) Dollars; that by reason of the said statutes your orator is unable to refuse to permit the said occupants of its premises the elevator service and the use of steam heat and hot and cold water without being in peril of large loss and its agents in great risk of fine and imprisonment if it should be finally determined that the said acts are valid; that by the said statute your orator is deprived of its vested rights in its property and that by the enforcement of the said statute and the acts of the legislature as aforesaid the vested rights to the use and enjoyment of property secured to your orator by the Constitution of the United States and the acts of Congress as aforesaid will be destroyed and rendered worthless."

For the purpose of jurisdiction and in order to entitle the plaintiff to injunctive relief as against the District Attorney, it was not necessary to show that criminal prosecution had actually been instituted, or even that it had been threatened. The objections taken by the District At-

torney in the Court below were met by the District Court as follows:

"Considering the actual sequence of events in *Ex parte Young*, 209 U. S., 123; *Raich* v. *Truax*, 239 U. S., 33; *Wilson* v. *New*, 243 U. S., 332, and *Hammer* v. *Dagenhart*, 247 U. S., 251, courts of first instance may well refrain from much legal exposition.

"It is true that the reasons assigned in some of these cases for going into equity, were in substance that the party complaining would be injured in some constitutional right by the operation of a statute alleged to be unconstitutional without ever being proceeded against himself; while in this instance plaintiff is personally subject to the operation of Chap. 951.

"But the public documents above mentioned prove that the object of Chapter 951 is not to extend criminal liability to owners of apartment houses, for that was done in April by Chapter 131. The purpose is to make criminally liable substantially all of the landlord's servants or agents concerned in the operation of an apartment house; and the reason for this is that it had been found practically impossible to prove guilty knowledge on the landlord's part, wherefore conviction was impossible.

"We do not understand that the Supreme Court has, in proceedings like this, barred from equity *all* persons who may be pursued under a criminal statute, but only

those who have under the statute a fair opportunity of raising the constitutional question in criminal proceedings brought directly against them. But in the cases which the legislature expected to produce by Chapter 951 this defendant would have no standing; yet if its agents are convicted, such conviction may obviously produce civil suits against and resultant liability on the part of this plaintiff.

"Without attempting to define the limitations of bills in equity against officials charged with the administration of the criminal law, we think this suit is within the practice of the cases cited."

In *Cramp & Sons, Eng. Co.* v. *Int. Curtis M. T. Co.* (246 U. S., 48), the Court said:

> "Plaintiffs are not, however, required to wait until criminal prosecutions are actually brought against them before invoking equitable relief, to which they are entitled under the circumstances."

(See to the same effect: *Detroit Cemetery Co.* v. *Canane,* 264 Fed. Rep., 845; *Wedd Co.* v. *Lockwood,* N. Y. Law Journal, October 20, 1920; *Golden* v. *Health Department,* 21 N. Y. App. Div., 420; *Scott* v. *Donald,* 165 U. S., 107; *Pennoyer* v. *McConnaughy,* 140 U. S., 1.)

CONCLUSION.

In final analysis it may be said that this legislation is unconstitutional because:

1. It deprives the plaintiff of its contract rights and impairs the obligation of contracts existing and in force at the time of the enactment of the legislation under consideration.

2. It deprives the plaintiff and other owners of buildings of their property without their consent and without due process of law.

3. It denies to the plaintiff and to other owners of buildings in the City of New York the equal protection of the law.

4. It compels the plaintiff against its will to render services to the defendants in violation of the 13th amendment to the Constitution of the United States.

Dated, Washington, D. C., February 28, 1921.

JOSEPH A. SEIDMAN,
Counsel for Appellant.

APPENDIX.

EXTRACT OF MINUTES OF COMMITTEE ON CIVIL AND CRIMINAL INFERIOR COURTS OF THE BROOKLYN BAR ASSOCIATION.

Held at 123 Remsen Street, Brooklyn, N. Y., on Wednesday, January 19th, 1921, attended by Justices of the Municipal Court of the City of New York, Borough of Brooklyn.

At this meeting Mr. Justice Ferguson made the following statement:

> "On the jury calendar I had three hundred and nine cases. The normal jury calendar is from seventy to one hundred cases, or an average of eighty-four. While I am on this jury question, this body ought to take up a very important subject, that is this, in these rent cases, the tenants now are almost all demanding jury trials, the effect of which is to carry the numerous cases over indefinitely. You take a calendar in the Fifth District with three hundred and nine cases on this calendar. It would be four hundred and nine next month and from the way things are going now, the best two judges can average is twenty cases during a week sitting. Twenty together, ten each of that kind of cases. Now the fact is this, the landlords have been burdened to the limit by tenants demanding jury trials and depositing one month's rent and having the case go over for probably ten months and the landlord

must be satisfied with one month's rent and and let the tenant in for ten months, so that he may reach his jury trial. If that situation continues, you might as well do away with any building speculation here or anywhere. As well as the control of the property is taken away from the landlord, you take away from him his rights to receive rents for a period of time and the courts will always be crowded as long as this condition exists. The only thing to do is to have an arbitrator appointed between the landlords and tenants and do away with the question of jury. It is impossible for a jury to sit there in a box, with nothing before them and take that mass of figures and decide anything about the case. My experience has been that in almost every case, the jury goes out and says the landlord wants Fifty Dollars, the tenant is paying Thirty Dollars, and we decide he is entitled to Forty Dollars. That is neither justice to the landlord nor to the tenant. I think the recommendation ought to be made that the right of trial by jury be denied, and unless you do that, you will see the worst results. Why! out of thirty cases, trial by jury has been demanded in almost twenty-nine."

Mr. Justice Ferguson, reporting on the business of the court and the deposits made by tenants for one month's rent, made the following statement:

"In the Fifth District, cash received from the 1st to the 17th of last year was $1,564.70 and the whole cash in 1921 from the 1st to the 17th was $10,663.41, paid

into the clerk. That means rent cases. That means trials and Mr. O'Leary (the court clerk) will tell you that three-quarters are now demanding jury trials. They know that by depositing one month's rent they can remain there for eight or nine months without paying rent, you will have to consider all this when you want to do anything."

Mr. Justice Niper, answering a question put to him by the chairman of the committee as to whether he had any method or idea of relief, answered:

"Yes, I have inclined to feel with what has just been suggested, I do not know. I have said nothing. There are some judges who have said a good many of the tenants are getting wise to the fact that by demanding jury trial they can stay in the place free. That situation is pretty nigh intolerable, particularly as has been stated by Judge Ferguson in the Fourth District. As to the general commercial calendar, it is very seldom crowded, many of these rent cases can be handled in batches of from five to twenty or forty cases, as Judge Farrar has said. With a little urging you can get the attorneys to have all the cases from one house tried together, anyway where the situation is similar, but whether the legislature is going to afford some relief for it or not, I do not know. I have hopes of a remedy, but that may be only a rumor and may not reduce the litigation."

Mr. Justice Doughty made the following statement:

> "In Part I, my practice has been to take the calendar each day and read the case from day to day and the attorneys would be up in front and say they would be ready the next day. My experience has been it would take an average of thirty-six days before a case could be reached that was ready. It hinders the crowded calendar, that is the thing."

Mr. Justice Law made the following statement:

> "As to the Seventh District, the figures which have been given me indicate that the business in the first two weeks is about three times what it was the first two weeks of January a year ago. Summonses filed, paid cases, 715; summons issued free, 5; that would be 720 as compared with summonses filed for the month of January, 473. Four hundred seventy-three takes in the whole month. I suppose half of that would be about 235 as against 715 of last year. There is no question in my mind about the calendar being in a terribly congested condition and I can see nothing which could relieve the situation. So far no relief has been given to the situation. There is only one suggestion I have in mind to make. I do not know whether that would prove to be all right either. It seems to me that relief would be afforded if the legislature would provide a bill of particulars where a standard of reasonableness was provided. I understand there is no standard of reason-

ableness used at all. Provide a standard where the reasonableness would be presumptive and then we might get some place. The members of the bar could get through with a case. If you had a standard of reasonableness which the court could apply, it would make a great difference. I think it would result in a great elimination of time spent looking things up. The tenants would recognize the standard and would be willing to pay what the law provided and the case would not get into the court and the effect of that would be a great decrease. My experience has been, and I think the same with the other judges, that when the old 25% ruling was in effect the general public indulged in the presumption that the law allowed an increase of 25% and they were willing to pay it. That was my experience with very few exceptions; they were willing to pay the increase because the law allowed it. I think it would be possible to fix a percentage of the assessed or actual valuation of the property. I myself think the assessed valuation of the property comes nearest the real valuation. If the case did come into the court it would be merely a matter of applying the standard. I think if the standard of reasonableness were fixed, even presumptive, the result would be many cases would be eliminated. I do not think they would come into the court at all."

EXTRACT FROM THE ANNUAL REPORT OF THE COMMITTEE ON COURTS OF INFERIOR JURISDICTION.

Made to the Association of the Bar of the City of New York, dated January 11, 1921.

In this report the committee reports on the business of the Municipal Courts in 1917, 1918, 1919 and 11 months of 1920. The Municipal Court is the only court in which landlord and tenant proceedings are instituted for the recovery of possession of property under the summary proceedings statute.

Their report shows the following business:

"The volume of work is large. The following are the best figures obtainable:

	Summonses Filed	Summary Proceedings	Total	Defaults	Trials
1917	135,826	98,591	234,417	63,671	35,507
1918	131,516	102,963	234,479	50,696	22,646
1919	.....	96,623	.....	.....	23,446
11 mos. of 1920...	146,628	101,933	248,561	35,498	24,502

They further report as follows:

"In April, 1920, came the 'Plague of the Locusts.' Some of the clerks, since September, have worked all day, all night, Sundays and holidays without additional compensation. As many as 1,500 summary proceedings were placed on the calendar for a single day in one district. In the Fifth District of Brooklyn the situation is reported as particularly out of hand. Most of the tenants and many of the landlords

have appeared without counsel. There has been no additional organization or facilities provided for the purpose of meeting additional business and labor caused by this influx of litigants into certain congested districts.

A personal visit to one of the parts on a busy 'Landlords and Tenants Day' with six or seven hundred of these proceedings on the calendar, attended by several hundred anxious and excited men, women, children and babies, all clamoring for attention, is required fully to realize and appreciate with what the justices and the clerical organizations of the district have had to contend.

In addition to the usual details of court litigation, the clerks in the busy districts, under the present statutes, are obliged to conduct a banking business, larger and more detailed than that of many substantial financial institutions in our rural communities. The Clerk of the Second District, Bronx, who is bonded for $5,000, has had on deposit over $200,000."

In a supplemental report it is stated by Mr. Bean, the Chairman of the Committee, that on January 11, 1921, there was on deposit with the Clerk of the Seventh District Municipal Court, Manhattan, upwards of $500,000.00.

The Committee further reports as follows:

"Results of these legislative failures.

The courts in the congested districts still remain congested. Some judges work

themselves to death and others do just enough to keep them out of trouble. The efforts to relieve congestion in the Bronx have been entirely spasmodic and heroically voluntary on the part of some of the justices. The court, as a whole, has failed to cope with the tide of rent litigation and has allowed it to submerge other work. In some districts there is a substantial denial of justice to litigants."

FEB 9 1921

No. 721

Supreme Court,
OF THE UNITED STATES.

MARCUS BROWN HOLDING COMPANY,
Complainant-Appellant,

—against—

MARCUS FELDMAN, BENJAMIN SCHWARTZ, FRANK SCHWARTZ, and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,
Defendants-Respondents.

MOTION TO ADVANCE BY COMPLAINANT-APPELLANT.

Now comes Marcus Brown Holding Company, a corporation, the complainant-appellant herein, and respectfully moves the advancement of the above entitled cause for early hearing during the present term, and preferably for hearing on the 28th day of February, 1921, the date set by this court for hearing of the case of *Hirsh* v. *Julius Block*, involving the constitutionality of the "Ball Rent Law" (41 St. L. 298).

This cause is pending in this court upon an appeal taken from a decree made and entered by the District Court of the United States, Southern District of New York, composed of three Judges in accordance with the provisions of Section 266 of the Judicial Code, which said court dismissed the bill of complaint filed herein and denied the

complainant's motion for an injunction. The bill of complaint was filed to procure a decree adjudging

1. That the defendant Edward Swann, as District Attorney of the County of New York, be enjoined and restrained from instituting proceedings or actions of any kind for any act done or committed or omitted by the complainant, its officers and agents, for its or their failure or refusal to furnish steam heat, hot and cold water, elevator service, or any other service or thing to the defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz, or any other person occupying any part of the building, the property of your complainant, and without its consent or permission and holding over against its will after October 1st, 1920, under color of the statutes and laws enacted by the said Legislature during the year 1920;

2. That the defendants Marcus Feldman, Benjamin Schwartz and Frank Schwartz, their agents and servants, be enjoined and restrained from entering upon or continuing to occupy the apartment herein described or to make use of any of the property belonging to this complainant without the complainant's consent; and

3. That each of the Chapters 942, 943, 944, 945, 946, 947, 948, 949, 950, 951 and 952 and Chapters 131, 132, 135, 136, 137 and 138 of the Laws of 1920 of the State of New York, hereinabove mentioned, be adjudged null and void and in contravention of the provisions of the Constitution of the United States of America;

The complainant is a large owner of real estate in the City of New York and also of a thirteen story modern apartment house in the bill of complaint described valued at $1,075,000 occupied by eighty-four tenants.

By reason of the so-called "Housing Bills" above referred to the complainant's business is threatened with partial, if not complete, destruction and irreparable damage if said acts be unconstitutional.

The bill of complaint alleges that said acts are not valid exercise of the Police Power of the State and are unconstitutional; that the New York State Legislature by enacting such legislation exceeded the powers delegated to it by the People of the State of New York and in contravention of the Constitutional Limitations. The District Court for the Southern District of New York has overruled the complainant's contention in this regard and dismissed its bill. In order that it may avoid irreparable damages and secure as adequate remedy as possible, it is necessary that this court should hear the cause at an early date. The Court of Appeals of the District of Columbia declared unconstitutional similar legislation (Ball Rent Law, 41 St. L. 298), in the case of *Hirsh* v. *Julius Block*, from which an appeal has been allowed and taken to this Court. It is, therefore, in the public interest that the conflict of authority on this question be speedily and authoritatively settled.

The complainant is but one of hundreds of property owners similarly situated, and these owners, like the complainant, have by this legislation been deprived of the possession of their property, of the power and ability to perform

leases entered into with lessees for the use and occupancy of apartments on and after October 1st, 1920, and of the benefits and profits to which they would otherwise be entitled to under leases with tenants now occupying apartments who by this legislation are authorized to refuse to pay the rent reserved and stipulated in leases duly executed long before these laws were enacted.

Notice of this application has been served on the defendants who join in this application.

Dated, January , 1921.

JOSEPH A. SEIDMAN,
Solicitor and Counsel for
Complainant-Appellant.

The undersigned join in the above application:

Dated, January 18, 1921.

CHARLES D. NEWTON,
Attorney General of the
State of New York.

SAMUEL R. GERSTEIN,
Attorney for Defendants
Feldman & Schwartz Bros.
DAVID L. PODELL, of Counsel.

ROBERT S. JOHNSTONE,
Attorney for District Attorney.

W. D. GUTHRIE,
Attorney for Joint Legislative Committee.

OPINIONS

OF

THE COURT OF APPEALS

OF

THE STATE OF NEW YORK

ON

THE CONSTITUTIONALITY OF THE EMERGENCY HOUSING LAWS.

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Court of Appeals.

PEOPLE OF THE STATE OF NEW YORK ex rel. DURHAM REALTY CORPORATION,

Appellant,

v.

EDWARD B. LAFETRA, a Justice of the City Court of the City of New York,

Respondent.

PEOPLE OF THE STATE OF NEW YORK ex rel. BRIXTON OPERATING CO.,

Appellant,

v.

EDWARD B. LAFETRA, a Justice of the City Court of the City of New York,

Respondent.

(Decided March 8, 1921.)

Appeal by relator in each case from order of the Appellate Division, first department, affirming, as matter of law, an order of Special Term which denied a motion for a peremptory mandamus requiring the defendant to issue a precept for the eviction of a hold over tenant from relator's premises.

GEORGE L. INGRAHAM for appellant,

WILLLIAM D. GUTHRIE and JULIUS HENRY COHEN, on behalf of the Attorney-General (ELMER G. SAMMIS and BERNARD HERSHKOPF, of counsel for the Joint Legislative Committee on Housing, with them on the brief),

JOHN P. O'BRIEN, Corporation Counsel (JOHN F. O'BRIEN of counsel), for respondent,

ALEXANDER C. MCNULTY for Real Estate Board of New York, intervenor.

LEONARD CLABER for Battery Realty Company, intervenor.

POUND, J. The relator in each case, except for the laws enacted at the extraordinary session of the legislature convened in September, 1920, to deal with an emergency in the housing situation in Greater New York, was, under subdivision 1 of section 2231 of the Code of Civil Procedure, entitled to institute summary proceedings for the removal of its tenant upon the expiration of his term. The leased premises were used for dwelling purposes. The tenant had, by written lease executed before the passage of the September laws, contracted to surrender the premises at the expiration of the term and the term had expired on the 30th day of Sptember, 1920. The defendant, when applied to by the landlord to issue a precept under section 2238 of the Code of Civil Procedure, refused to entertain the application on the ground that by the provisions of chapter 942 of the laws of 1920, the proceeding could not be instituted before the 1st day of November, 1922. The landlord thereupon applied for a writ of mandamus requiring the defendant to issue such precept, asserting that chapter 942 was unconstitutional as impairing the obligation of the contract of lease (U. S. Const., art. II, sec. 10); depriving the landlord of its property without due process of law; denying to it the equal protection of the laws (U. S. Const. Fourteenth Amend.) and taking private property not only for private use but without compensation (N. Y. Const., art. I, sec. 6); in brief, that it took its private property and

turned it over to another without its consent. The courts have thus far upheld the constitutionality of the law in question on the ground that summary proceedings are a creature of the statute and may be abolished at the legislative will. But the official explanation of the law appended to and submitted with the bill states its purpose and effect to be "to do away with the anxiety of the many people in New York who have been served with notices to move on October 1". This declared purpose draws with it the consideration of a group of statutes enacted at the same session to meet a supposed crisis which are closely related to each other; are a part of the same plan of remedial protection to the tenants in possession on October first, and can be fairly understood only when considered as parts of one comprehensive design.

These statutes, commonly and collectively known as the September housing laws, include chapters 942-953, inclusive, but chapters 943, 945, 946, 948-953, inclusive, are not directly before the court on this appeal. The reason stated for their enactment is that within New York city and contiguous counties an emergency in the housing situation had arisen as a sequence of the activities of the World War and the astonishing growth of large cities whereby at the same time building had stopped and the home seeking population of the city had vastly increased; dispossess proceedings, more than had ever been known before, were pending to the number of upwards of 100,000; each proceeding practically involved a family averaging four or five persons. The demand for homes thus became in excess of the supply; the landlords took advantage of the situation to exact, under threats of eviction, whatever exorbitant rents the neces-

sities of the occasion would bring forth; tenants offered themselves who would submit to such demands rather than take the chance of finding other places of abode. The legislature had investigated the situation through the agency of its joint committee; the governor had called the legislature in special session to deal with the subject, although at its regular session in April it had passed what are known as the April housing laws, dealing with the same subject, which had failed substantially to relieve the existing conditions. While the inadequacy of housing facilities in cities had become a matter of world-wide concern, in the closely settled metropolis it was a problem of the utmost gravity, calamitous in its possibilities. The legislature, unequal to the task of caring for all, decided to make the tenants in possession a preferred class by staying until November 1, 1922, all proceedings to dispossess them, except for reasons hereinafter stated, so long as they paid a "reasonable rent", which is the term used for a statutory charge for use and occupation to be ascertained judicially through a method provided by the statutes.

The owners of dwellings, including apartment and tenement houses (but excepting buildings under construction in September last, lodging houses for transients and the larger hotels), were, therefore, wholly deprived until November 1, 1922, of all possessory remedies for the purpose of removing from their premises the tenants or occupants in possession when the laws took effect, except where the person holding over is shown to be objectionable, or the landlord seeks to occupy the premises as a dwelling for himself and family, or intends to demolish the building and construct a new building, or has sold to a co-operative ownership plan corporation,

providing such tenants or occupants are ready, able and willing to pay a reasonable rent or price for their use or occupation. The presumption is created that any demand for rent greater than that in any year prior to such demand is unreasonable and oppressive. The landlord may not evict the statutory tenants although they remain as free to depart as they were prior to the enactment of the housing laws. To accomplish this purpose the legislature first enacted chapter 942, to amend the Code of Civil Procedure in relation to summary proceedings, which recited that a public emergency existing, no summary proceedings, should be maintained until the first day of November, 1922, to recover possession of real property, except for one of the four reasons indicated above. It also provided that in pending hold over proceedings, where no warrant had been issued, the warrant should not be issued unless the proceeding came under one of the exceptions above quoted. This chapter is supplemented by chapter 947, which amends the Code of Civil Procedure in relation to actions to recover possession of real property and prohibits the landlord for the same period from maintaining an action to recover possession of real property, with the same exceptions previously indicated, and by chapter 944, which recites that unjust, unreasonable and oppresive agreements for the payment of rent have been made and exacted from tenants under stress of prevailing conditions whereby the freedom of contract has been impaired, and congested housing conditions resulting therefrom have seriously affected and endangered the public welfare, health and morals in certain cities of the state; preserves the action for rent, provides that the plaintiff may recover a fair and reasonable rent for the

premises, and further provides that on default of payment of the fair rental value, the landlord may obtain provision in chapter 944 above quoted was first incorporated in chapter 136, Laws of 1920, and applies at least to leases made after April 1, 1920. Its retroactive effect is not at present before the court for consideration. Chapters 942 and 947 apply only to "cities of a population of one million or more and in cities in a county adjoining such a city." Chapter 944 applies to cities of the first class and cities in a county adjoining such city.

Whether or not a public emergency existed was a question of fact, debated and debatable, which addressed itself primarily to the legislature. That it existed; promised not to be presently self-curative, and called for action appeared from public documents and from common knowledge and observation. If the law-making power on such evidence has determined the existence of the emergency and has, in the main, dealt with it in a manner permitted by the constitutional limitations upon legislative power, so far as the same affect the class of landlords who now challenge the statutes, the legislation should be upheld. How it may operate on other classes or individuals not before the court is not our present concern. The relator comes indisputably within the main purpose of the statutes, but it has no standing to raise questions which do not directly affect it (*Arizona Employers' Liability Cases*, 250 U. S. 400, 409). When the emergency ceases to exist (*Municipal Gas Co.* v. *Public Service Comm.*, 225 N. Y. 89, 95, 97); when ejectment is sought for other purposes than to dispossess hold-over tenants under protection of the laws; when a landlord desires to withdraw from the business of renting his premises for dwelling purposes, or when other ma-

terial questions arise, the parties aggrieved will then be heard in their own right.

If chapter 942 alone were to be considered, we would not hesitate to say that the legislature might repeal or suspend in whole or in part the remedy of summary proceedings for the possession of real property provided by the Code of Civil Procedure. The landlord has no vested or contractual property right in any particular form of remedy so long as he is permitted effectively to recover possession of his real property, and the only effect of the law in question is temporarily to deprive the landlord of the summary remedy given by statute, except in certain cases. A general act abolishing such remedy would not impair the obligation of the contract (*Conkey* v. *Hart*, 14 N. Y. 22). But chapter 947 also prohibits the landlord for two years from maintaining an action to recover possession of his real property at the expiration of the term, and any law which in its operation amounts to a denial or obstruction of rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution (*McCracken* v. *Hayward*, 2 How. 608, 612; *Barnitz* v. *Beverly*, 163 U. S. 118, 125). A reasonable alteration of the remedy which does not materially impair it is constitutional (*Penniman's Case*, 103 U. S. 714). The state has, however, made no contract to continue in force the existing possessory remedies in their entirety, nor have the parties so stipulated in their contract. Possessory actions having been for the time done away with, to the extent indicated, the action for rent is preserved by chapter 944, but "it shall be a defense to an action for such rent that the rent is unjust and unreasonable." No tenant is forced out of his home so long as he pays the fair monthly

rent, but a dispossess warrant may be issued if he fails to pay. A comprehensive substitute for the possessory remedies thus becomes the keystone of the arch.

To uphold the right of the landlord to maintain ejectment would be to crack the legislative design into fragments which would afford little protection to the tenants in possession. The explanation accompanying the bill, chapter 947, which withdraws the remedy of ejectment until November 1, 1922, says: "The summary proceeding of hold-over being taken away, the landlord can bring an action in the Supreme Court and recover judgment against the tenant by default in twenty days *and thus defeat the purpose of the legislation abolishing hold-overs except in three instances. To obviate this difficulty,*" chapter 947 is enacted. Although the separation of the component parts of the general plan into independently numbered statutes signifies the legislative design to save each part that is in itself good on constitutional grounds, chapters 942, 944 and 947 will, if possible, be construed together and given a congruous effect before the court goes to the easier task of considering chapter 942 alone. So taken, the arguments against their constitutionality as a whole are in form the familiar objections which are addressed to the court whenever the exercise of legislative power on private rights is in question. Their force depends upon their application to the particular case.

The proposition is fundamental that private business may not be regulated, and may not be converted into public business by legislative fiat (*Producers' &c. Co.* v. *R. R. Comm.*, 251 U. S. 228). By the application of this principle the act of Congress known as the Ball Rent Law, for the relief of tenants in the District of Columbia, applicable to all rental property, was said to be uncon-

stitutional by the Court of Appeals of the District (*Hirsh* v. *Block*, 267 Fed. Rep. 614; certiorari denied, 254 U. S.——). The proposition is equally fundamental that the state may establish regulations reasonably necessary to secure the general welfare of the community by the exercise of its police power although the rights of private property are thereby curtailed and freedom of contract is abridged (*Chicago, B. & Q. Ry.* v. *Drainage Comm.*, 200 U. S. 561; *Rast* v. *Van Deman*, 240 U. S. 342; *American Coal Min. Co.* v. *Special Coal & Food Com.*, 268 Fed. 563). The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process. Either the rights of property and contract must, when necessary, yield to the public convenience, advantage and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare.

The first question to be considered arises under chapter 944, which provides that it shall be a defense to an action for rent accruing under an agreement therefor that such rent is unjust and unreasonable and the agreement to pay is oppressive. May the legislative power, in a season of exigency, consistently with the due process clauses of the state and federal Constitutions designed to protect property rights, so invade the domain of private contract as to interfere with and regulate the right of a landlord to exact what he will for his own in the way of rent for private property?

The landlord is a purveyor of a commodity; the vendor of space in which to shelter one's self and family. He has heretofore been permitted to make his own terms with his tenants, but that consideration is not conclusive. Unquestionably some taking of private property for the benefit of a class of individuals is the result of the housing laws. The free choice of tenants; the unlimited right to bargain; these are property rights which may not be affected unless a public advantage over and beyond such rights justifies legislative interference, but "an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use" (*Noble State Bank* v. *Haskell*, 219 U. S. 104, 110, 580). While in theory it may be said that the building of houses is not a monopolistic privilege; that houses are not public utilities like railroads and that if the landlord turns one off another may take him in; that rents are fixed by economic rules and the market value is the reasonable value; that people often move from one city to another to secure better advantages; that no one is compelled to have a home in New York; that no crisis exists; that to call the legislation an exercise of the police power when it is plainly a taking of private property for private use and without compensation is a mere transfer of labels which does not affect the nature of the legislation, yet the legislature has found that in practice the state of demand and supply is at present abnormal; that no one builds because it is unprofitable to build; that those who own seek the uttermost farthing from those who choose to live in New York and pay for the privilege rather than go elsewhere; and that profiteering and oppression have become

general. It is with this condition and not with economic theory that the state has to deal in the existing emergency. The distinction between the power of eminent domain and the police power is often fine. In the main it depends on whether the thing is destroyed or is taken over for the public use. If property rights are here invaded, in a degree, compensation therefor has been provided and possession is to be regained when such compensation remains unpaid. What is taken is the right to use one's property oppressively and it is the destruction of that right that is contemplated and not the transfer thereof to the public use. The taking is, therefore, analagous to the abatement of a nuisance or to the establishment of building restrictions, and it is within the police power.

Emergency laws in time of peace are uncommon but not unknown. Wholesale disaster, financial panic, the aftermath of war (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 161), earthquake, pestilence, famine and fire, a combination of men or the force of circumstances may, as the alternative of confusion or chaos, demand the enactment of laws that would be thought arbitrary under normal conditions (*Bowditch* v. *Boston*, 101 U. S. 16, 18-19; *American Land Co.* v. *Zeiss*, 219 U. S. 47). Although emergency cannot become the source of power, and although the Constitution cannot be suspended in any complication of peace or war (*Ex parte Milligan*, 4 Wall. 2), an emergency may afford a reason for putting forth a latent governmental power already enjoyed but not previously exercised. Thus it has been held that although the relation between employer and employee is essentially private, so far as the right to fix a standard of wages by agreement is concerned, Congress may es-

tablish a standard of wages for railroad employees to be in force for a reasonable time in an emergency to avert the calamity of a nation-wide strike (*Wilson* v. *New*, 243 U. S. 332, 348; *Ft. Smith & W. R. R. Co.* v. *Mills*, 253 U. S. 206).

Even in the absence of an emergency, the state may pass wholesome and proper laws to regulate the use of private property (*Lincoln Trust Co.* v. *Williams Bldg. Corp.*, 229 N. Y. 313; *St. Louis Advertising Co.* v. *City of St. Louis*, 249 U. S. 269). Laws restricting the uses of property do not deal directly with the question whether a private business may be limited in its return to a reasonable rate fixed by a force external to the law of supply and demand. Aside from the war power, the regulation of prices, except for public utilities, is unusual, although usury statutes which forbid the taking of exorbitant interest on the loan of money are common. The power of regulation exists, however, and is not limited to public uses or to property where the right to demand and receive service exists or to monopolies or to emergencies. It may embrace all cases of public interest, and the question is whether the subject has become important enough for the public to justify public action (*Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331; *A. M. Halter Hdw. Co.* v. *Boyle*, 263 Fed. 134; *American Coal Min. Co.* v. *Special C. & F. Comm.*, *supra*).

The field of regulation constantly widens into new regions. The question in a broad and definite sense is one of degree. As no similar legislation has been construed by the courts, precedent is of little value and may

prove misleading. Formulas and phrases in earlier decisions are not controlling (*Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355). English laws and decisions, based on the long-established practice of considering those in possession of agricultural and pastoral lands and small holdings under lease as having a kind of imperfect moral interest beyond their subsisting term recognize the tenant right of renewal. But such laws do not aid us. They are the offspring of ancient and alien customs which were not transplanted to our soil with the common law. The supposed right of the tenant to remain on the land is not, in this state, recognized as a basis of property right. It is nothing but a chance. The crudest equities may, however, become powerful enough to make the tenant in possession the subject of protection by the law.

Novelty is no argument against constitutionality. Changing economic conditions, temporary or permanent, may make necessary or beneficial the right of public regulation (*German Alliance Ins. Co.* v. *Kansas*, *supra*). Housing in normal times may be and often is a competitive business; landlords may in the lean years and in periods of over-supply be unable to secure a fair return on their investments. Competition will then regulate rents more effectively than legislation can. An historical justification of liberty of contract between landlord and tenant is not a demonstration that the system must survive every exigency. When it temporarily ceases to be adapted to the demands of the present it may be modified, if the best interests of society are thereby served. "An earnest conflict of serious opinion" may arise as to whether such interests have been wisely served or whether the legislation is anything more than another

example of misdirected zeal in dealing with a crisis. But that argument does not address itself to the court. "The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative consideration in dealing with the matter of policy" (*Chicago, B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549, 569; *Germar Alliance Ins. Co.* v. *Kansas, supra*). The objection to chapter 944 that when it temporarily fixes reasonableness as the standard of rent in order to prevent oppression, it deprives the landlords of property without due process of law seems untenable when tested by the principles above stated.

The next question is whether the landlords who rent dwellings are denied the equal protection of the law. Legitimate governmental authority ought to be able to protect unobjectionable tenants, ready and willing to pay reasonable rents, from wholesale evictions for the further enrichment of profiteers who have brought themselves to the notice of the legislature by their greed and extortion, without subjecting landlords who have not offended and tenants who have no substantial grievance to a restraint that a class has invited by its conduct. One class of landlords is selected for regulation because one class conspicuously offends; one class of tenants has protection because all who seek homes cannot be provided with places to sleep and eat. Those who are out of possession, willing to pay exorbitant rentals, or unable to pay any rentals whatever, have been left to shift for themselves. But such classifications deny to no one the equal protection of the laws. The distinction between the groups is real and rests on a substantial basis (*People* v. *Beakes Dairy Co.*, 222 N. Y. 116).

The next question is whether such laws impair the obligation of contracts, as applied to existing leases and tenancies which contain an express or implied obligation to surrender possession at the expiration of the term or as applied to a case where it is claimed that the parties had contracted or stipulated between themselves in dispossess proceedings that the warrant should be issued on October first. The provision of the Federal Constitution that no state shall pass any law impairing the obligation of contracts puts no limit on any lawful exercise of legitimate governmental power (*Legal Tender Cases*, 12 Wall. 457, 551). The rule alike for state and nation is that private contract rights must yield to the public welfare, when the latter is appropriately declared and defined and the two conflict (*Manigault* v. *Springs*, 199 U. S. 473, 480; *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 488; *Producers' Transportation Co.* v. *R. R. Comm.*, *supra*; *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, 558; *Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U. S. 372, 375). But if the law is "arbitrary, unreasonable and not designed to accomplish a legitimate public purpose" (*Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 234) the courts will declare it invalid.

But it is contended that the only laws which may be said to impair the obligation of contracts which have been upheld are those in which the United States, which is not included within the constitutional prohibition, has acted (*Sinking Fund Cases*, 99 U. S. 700, 718), to assert its limited but unquestioned sovereignty; as in the *Legal Tender Cases*, to regulate the currency; and in the *Mottley Case* (*supra*) to make illegal all discriminatory rates of interstate carriers; or where the state has acted to regulate public utilities as in the *Producers' Case* (*supra*)

to subject contracts for future transportation by common carriers to regulation; or in cases where the effect of laws prohibiting the sale of liquor or narcotics or the conducting of lotteries and the like, for the public good, was indirectly to affect the contract (*Beer Co.* v. *Mass.*, 97 U. S. 25, 32); or in which the state had exercised the power of eminent domain to extinguish a contract right; and that the obligation of no ordinary private contract could, without violence to the plain words of the Constitution, be impaired by the exercise of the police power. As the purpose of these laws is temporarily to deprive landlords of all power to enforce covenants to quit in leases, although made prior to the enactment of the laws, it is urged that if such legislation is upheld the contract clause of the Constitution gives little protection to private contractual rights.

Laws directly nullifying some essential part of private contracts are rare and are not lightly to be upheld by hasty and sweeping generalizations on the common good (*Barnitz* v. *Beverly, supra; Bradley* v. *Lightcap*, 195 U. S. 1.), but no decision upholds the extreme view that the obligation of private contracts may never be directly impaired in the exercise of the legislative power. No vital distinction may be drawn between the exercise in times of emergency of the police power upon the property right and upon the contract obligations, for the promotion of the public weal. The state in an emergency caused by flood or fire, when multitudes are homeless, might conceivably compel owners of houses to take in undesired occupants in order to shelter them from exposure to storm and cold. Why then would the state have no power reasonably to regulate for a time the terms upon which a landlord under such conditions may put

his tenants out so long as they promptly pay a reasonable compensation for the use of the property? The distinction thus proposed becomes illusive when practically applied.

No constitutional difficulty presents itself in the way of enforcing the laws on the ground of uncertainty as to what constitutes a reasonable rent or an oppressive agreement. Courts and juries are in civil cases constantly dealing with questions of proper care, just compensation, reasonable conduct, fair market value and the like. It is quite a different thing to say that Congress may not punish the act of making "any unjust or unreasonable rate or charge" in dealing with necessaries because the language is too indefinite and uncertain upon which to fasten criminal liability (*United States* v. *L. Cohen Grocery*, U. S.). The test is not what the jury may say, but what the jury may reasonably infer from the evidence (*Nash* v. *United States*, 229 U. S. 373). The exaction of an unjust and unreasonable rent makes oppressive the agreement under which the same is sought to be recovered.

The suspension of possessory remedies does not impair the jurisdiction of the Supreme Court in law and equity (N. Y. Const., art. VI. sec. 1). The legislature has power "to alter and regulate the jurisdiction" and to change the common law (N. Y. Const., art. VI, sec. 3; *Matter of Stilwell*, 139 N. Y. 337, 342).

The question comes back to what the state may do for the benefit of the community at large. Here the legislation rests on a secure foundation (*Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67, 76, 77). The struggle to meet changing conditions through new legislation

constantly goes on. The fundamental question is whether society is prepared for the change. The law of each age is ultimately what that age thinks should be the law. Decisions of the courts in conflict with legislative policy, when such decisions have been thought to be unwisely hard and stiff, have been met by constitutional amendments, as in the case of the decision of the Supreme Court of the United States in the Income Tax cases (*Pollock* v. *Farmers' &c. Co.*, 158 U. S. 601) which led to the adoption of the Sixteenth Amendment; and of this court on the statute which fixed an eight hour day and the prevailing rate of wages for employees of municipal contractors; and on the Workmen's Compensation Law (*Peo. ex rel. Rodgers* v. *Coler*, 166 N. Y. 1; N. Y. Const., art. XII, sec. 13; *Ives* v. *S. Buffalo Ry. Co.*, 201 N. Y. 271; N. Y. Const., art. I, sec. 19). Each of the latter laws was also approved by the Supreme Court of the United States (*Atkin* v. *Kansas*, 191 U. S. 207; *N. Y. Central R. R. Co.* v. *White*, 243 U. S. 188). The reaction on the courts is that a strong opinion in any real or fancied public need has been suggested as the sufficient test (*Noble State Bank* v. *Haskell*, *supra*). But constitutional limitations on the power of government are self-imposed restrictions upon the will of the people and qualify the despotism of the majority. Such limitations do not yield to strong opinions merely. They are incorporated in the fundamental law to restrict power. They forbid government to take from the owner without compensation whatever private right to control the use of his property the many may earnestly desire to deprive him of. Isolated expressions of the courts may suggest that whatever the legislature enacts on grounds of public policy should be

sustained, but the courts may not uphold the exercise of unconstitutional and arbitrary power. What is arbitrary and what is beneficent must be decided by common sense applied to a concrete set of facts. To uphold private contracts and to enforce their obligations is a matter of high public consequence, but the legislature has a wide latitude in doing what seems in accordance with sound judgment and reasonableness in order to bring about a great good to a large class of citizens, even at some sacrifice of private rights.

Curative action is needed. While some may question whether it may be said without exaggeration that these enactments promote the public health or morals or safety, they do in a measurable degree promote the convenience of many, which is the public convenience, and the public welfare and advantage in the face of the extraordinary and unforeseen public exigency, which the legislature has, on sufficient evidence, found to exist.

The conclusion is, in the light of present theories of the police power, that the state may regulate a business, however honest in itself, if it is or may become an instrument of widespread oppression (*People* v. *Beakes Dairy Co., supra*, and cases cited; *Pague* v. *Kansas*, 248 U. S. 112); that the business of renting homes in the city of New York is emergently such an instrument and has, therefore, become subject to control by the public for the common good; that the regulation of rents and the suspension of possessory remedies so far tend to accomplish the purpose as to supervene the constitutional inhibitions relied upon to defeat the laws before us (*Brown Holding Co.* v. *Feldman*, —— Fed. ——).

The order appealed from should be affirmed, with costs.

Hiscock, Ch. J., Hogan, Cardozo and Andrews, J. J., concur; Crane, J., concurs in result on opinion in *Guttag v. Shatzkin*, decided herewith. McLaughlin, J., dissents on dissenting opinion in *Levy Leasing Co. v. Siegel*, decided herewith.

Order affirmed.

Court of Appeals.

JACOB L. GUTTAG,

Respondent,

v.

HYMAN SHATZKIN,

Appellant.

(Decided March 8, 1921.)

This action was brought to recover the possession of the premises described in the complaint. The defendant demurred on the ground that the facts alleged did not state a cause of action, whereupon the plaintiff moved for judgment on the pleadings which was denied.

The constitutionality of chapter 947 of the laws of 1920 is involved. The Appellate Division held the chapter unconstitutional, overruled the demurrer and granted leave to the defendant to plead over.

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ELMER G. SAMMIS and BERNARD HERSHKOFF, of counsel for the Joint Legislative Committee on Housing.

CRANE, *J.* I agree with much that has been said by Pound, *J.*, in *People ex rel. Durham Realty Corporation*

v. *La Fetra* and in his result but desire to add the following reasons for my own conclusion.

The late war caused the difficulty which the New York state legislature, by these laws, has sought to ameliorate in so far as applicable to the city of New York. In the exercise of the war powers the railroad facilities of the country were taken over by the federal government. Shipments of all material were restricted or prohibited and the labor market was depleted by the withdrawal of mechanics and laborers for government work or service in the army and navy. In consequence no building of any account was done in the city of New York and the housing facilities at the close of the war were entirely inadequate to accommodate the people. The legislature had before it reports of investigating committees showing that rents had become exorbitant through unscrupulous and profiteering landlords, that as many as 100,000 families were threatened with eviction on the first day of October, 1920, with no place to go, and that families had become scattered. Apparently an emergency was created which called for immediate relief, not merely for comfort, but for the actual necessaries and decencies of life. The law-makers had reason to believe that the homes, health and morals of about 500,000 people were at stake and that immediate action was required. No power to meet such an emergency existed unless it was possessed by the New York state legislature. Our government was not so effete as to be barren of relief. It suspended for a time the right to dispossess tenants, it proscribed exorbitant rentals.

If 100,000 families were suddenly on the streets of the great metropolis without shelter, the state in the exer-

cise of its reserve power could compel their housing at a reasonable rental to be paid by themselves or by the state. Private property could for the emergency be commandeered. The legislature by the laws in question has simply prevented such a catastrophe by requiring landlords at reasonable rental to keep tenants until normal building conditions have returned.

The war brought into use powers not before so extensively used, but nevertheless always existing. The war power of Congress and the police power of the state are well-known functions of government. It is only their application to new difficulties which ever causes comment. As nations grow, powers must expand. Thus the war power suspended many things and regulated, not merely the fighting forces, but nearly all economic activities. The railroads and telegraphs were taken over and intrastate rates established (*Northern Pacific Ry.* v. *North Dakota*, 250 U. S. 135; *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163). The maximum price of coal was fixed and the sale and distribution of food products controlled (*United States* v. *Penn. Central Coal Co.*, 256 Fed. Rep. 703). No surprise was shown when buildings were taken for government war agencies at a reasonable price, which of necessity meant the price the government was willing to pay. Necessity commandeered buildings for a fair return. The complete and undivided character of the war power of the United States is not disputable (*Northern Pacific Ry. Co.* v. *North Dakota, supra*) and is not confined to actual hostilities, for it carries with it inherently the power to guard against the immediate renewal of the conflict or *to remedy the evils which have arisen from its rise and progress* (*Hamilton* v. *Kentucky Distilleries Company*, 251 U. S. 146, 161).

The provision of the Federal Control Act (40 Stat. 458, sec. 14) that the United States may retain its possession of the railroads until eighteen months after the ratification of peace is an instance where the war powers were continued to enable readjustment and prevent disaster. And yet the war power affects contracts and property rights.

While the states are subject to the contract clause of section 10, article I and section 1, article XIV of the United States Constitution, the police power of the states may affect contracts and modify property rights without violation of these provisions. Conceding the health, safety and morals of its citizens to be involved and the circumstances to justify a proper interference by the state, neither the contract nor due process of law clause stand in the way (*Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372). These sections of our Federal Constitution and the police power of the states harmonize and never conflict. The only question here is one of fact, not one of law; do the facts call into existence the power reserved to the states to legislate for the safety and health of the people? Within its sphere the police power of the states is not unlike the war power of the nation. Both are rules of necessity, impliedly or expressly existing in every form of government, the one to preserve the health and morals of a community, the other to preserve sovereignty.

When, therefore, by reason of disordered conditions due to war and the federal war powers, the people of New York city could find no other homes than those they possessed and were threatened with ejectment or dispossess except upon payment of exorbitant rents, the

state legislature had the power to stay any and all proceedings for a reasonable time—that is, while the danger or peril lasted, and until readjustment took place, the owner receiving fair compensation meanwhile.

This is not a case, in my judgment, where the legislature has undertaken to regulate housing rates because such a business has become charged with a public interest. We are not called upon to express any opinion upon such a power. Circumstances due to war conditions have created a peril to life and health and with this the state has attempted to deal until the peril be passed. The laws are not effectual any longer than the necessity demands, which may be less than the two years prescribed.

Similar laws for emergencies have been passed before (*American Land Co.* v. *Zeiss*, 219 U. S. 47, 60; *Bertrand* v. *Taylor*, 87 Ill. 235; *Bowditch* v. *Boston*, 101 U. S. 16; *Breitenbach* v. *Bush*, 44 Pa. 313; *Wilson* v. *New*, 243 U. S. 332; *Hoffman* v. *Charlestown Five Cts. Sav. Bank*, 231 Mass. 324; *Hasbrouck* v. *Shipman*, 16 Wisc. 296).

For these reasons the order of the Appellate Division must be reversed and that of the Special Term affirmed. The first and third questions certified are answered in the negative, and the second in the affirmative.

Same vote as in *People ex rel. Durham Realty Corporation* v. *La Fetra*, decided herewith.

Court of Appeals.

EDGAR A. LEVY LEASING CO., INC.,

Appellant.

v.

JEROME SIEGEL,

Respondent.

(Decided March 8, 1921.)

Appeal from an order of the Appellate Division, first department, affirming an order of the Special Term, denying plaintiff's motion for judgment on the pleadings.

LOUIS MARSHALL for appellant.

WILLIAM D. GUTHRIE and JULIUS H. COHEN, Special Deputy Attorneys-General.

ELMER G. SAMMIS and BERNARD HERSHKOPF, of counsel for the Joint Legislative Committee on Housing.

FRANCIS M. SCOTT *amicus curiae.*

Order affirmed, with costs, on opinion of Pound, J., in *People ex rel. Durham Realty Corporation* v. *La Fetra,* decided herewith. Same vote.

MCLAUGHLIN, J. (dissenting): The complaint in this action alleged, in substance, that on the 26th of June, 1918, the plaintiff, a domestic corporation, leased to the defendant an apartment in the city of New York for a period of two years commencing October 1, 1918, at an annual rental of $1,450, payable in equal monthly instalments on the first day of each month; that defendant went into and continued in possession under the lease

until the expiration of the term therein provided; that on the 3rd of May, 1920, the parties entered into a written agreement, renewing the lease for a further term of two years from the 1st of October, 1920, at an annual rental of $2,160, payable in equal monthly instalments on the first day of each month; that defendant neglected and refused to pay the rent falling due on the 1st of October, 1920, amounting to $180, which sum was due and owing the plaintiff, and for which judgment was demanded.

The answer admitted all the allegations of the complaint, except that the amount of rent was due and payable, which was denied. This denial did not raise an issue, since it was a mere legal conclusion. The answer then set up two affirmative defenses: *First*, that the parties executed the lease and renewal as mentioned in the complaint; that prior to the execution of the renewal, plaintiff, with intent to coerce defendant into signing the same, stated in words or substance that unless he did so at the increased rental, it would terminate his tenancy at the end of the then leased term, and he would be obliged to move; that "defendant believed and relied upon said statement and was fearful that plaintiff would carry out said threat . . . and that defendant would be unable to secure any suitable or similar apartment, owing to the scarcity of such apartments"; "that solely by means of such threats and coercion and duress, the plaintiff induced defendant to sign the alleged renewal of lease above mentioned providing for such increased rental"; and that defendant had tendered and offered to pay the rent for the month of October, 1920, to the extent of $120.83, which was the monthly instalment paid for said premises for the month of September, 1920.

The second affirmative defense realleged the facts set forth in the first, and in addition thereto alleged that the rent reserved in the instrument purporting to be the renewal lease, and claimed by plaintiff for the month of October, 1920, was "unjust, unreasonable and oppressive."

The judgment demanded was that the alleged renewal lease be "rescinded, vacated and set aside" and that the complaint be dismissed.

After issue had been joined, plaintiff moved, under section 547 of the Code of Civil Procedure, for judgment on the pleadings. The motion was denied, an appeal taken to the Appellate Division, where the order was affirmed, two of the justices dissenting, and leave given to appeal to this court, certifying certain questions. Two of the questions certified were whether the affirmative defenses constituted a defense to the plaintiff's claim, and the others whether chapter 944 of the Laws of 1920 were constitutional.

The facts pleaded in the first affirmative defense were insufficient upon the face thereof and in this all the members of the court agree. Such facts do not constitute duress, nor do they show that plaintiff was coerced into signing the renewal; on the contrary, they show that defendant voluntarily executed it with full knowledge of its contents. He had been told that unless he renewed the lease at the increased rental he would have to vacate and surrender the premises at the end of the term under which he was then in possession. He states that he relied upon what plaintiff told him and believed it would compel him to vacate the premises unless he executed the renewal. This is precisely what he agreed to do when he executed the lease and what the law obligated him to do. He does

not allege as a fact that he had been unable to secure another apartment, or that he had made any effort at all in that direction. He alleges he was fearful plaintiff would terminate the lease, cause him to remove from the premises, and that he would, in that event, be unable to secure a similar apartment owing to the scarcity thereof; in other words, this allegation is based entirely upon what he feared might take place. There is no allegation that he had, at any time prior to the commencement of the action, claimed that the renewal lease was obtained by duress or that he had attempted to have it rescinded on that account, nor did he offer to rescind; on the contrary, he continued in possession and sought to hold the same under the lease which he claims was obtained by duress. The defense of duress is predicated on the alleged threat of the landlord to exercise his lawful right to regain possession of the premises at the expiration of the term then in force. It never constitutes duress for a person to threaten to enforce his legal rights by lawful means (*McPherson* v. *Cox*, 86 N. Y. 472; *Dunham* v. *Griswold*, 100 N. Y. 224). If he had been coerced into signing the renewal, he could rescind for that reason, but in order to do so he had to surrender possession of the property. This is the general rule. A party cannot rescind while retaining the fruits of the contract. In case of real estate he must surrender possession before he can maintain an action for rescission of the instrument under which he obtained possession (*Schiffer* v. *Dietz*, 83 N. Y. 300; *Tompkins* v. *Hyatt*, 28 N. Y. 347, 353; *Oregon Pacific R. R. Co.* v. *Forrest*, 128 N. Y. 83).

The second affirmative defense realleges the facts set forth in the first, and then alleges that the rent reserved in the writing purporting to be a renewal lease, and

claimed by plaintiff for the month of October, 1920, was "unjust, unreasonable and oppressive." This defense is predicated on chapter 944 of the Laws of 1920. If that be valid, then the defense pleaded is good. If the act be void, it furnishes no defense; in other words, if the act be unconstitutional, it is not a law. "It confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed" (*Norton* v. *Shelby County*, 118 U. S. 425, 442).

Appellant contends the act is unconstitutional in that it impairs the obligation of the contract of lease (Federal Const., art. 1, sec. 10); deprives the plaintiff of its property without due process of law; denies to it the equal protection of the law (Federal Const., Fourteenth Amendment); and takes private property for a private use without compensation (Const. State of New York, art. 1, sec. 6).

This act purports to amend, but is really designed to entirely supersede, chapter 136 of the Laws of 1920. It provides that it shall be a defense to an action for rent accruing under an agreement for premises in a city of the first class, or in a city in a county adjoining a city of the first class, occupied for dwelling purposes, that such rent is unjust, unreasonable and the agreement under which the same is sought to be recovered is oppressive (sec. 1). That where the answer contains the defense mentioned in section 1, the plaintiff, within five days thereafter (unless upon good cause shown the time be enlarged) must file with the clerk of the court a verified bill of particulars setting forth certain specified facts, and if he does not, the complaint shall, upon motion of the defendant, be dismissed (sec. 2). That where it appears

that the rent has been increased over the rent as it existed one year prior to the agreement under which the rent is sought to be recovered, such agreement shall be presumptively unjust, unreasonable and oppressive (sec. 3). That the plaintiff may plead and prove in such action a fair and reasonable rent for the premises and recover judgment therefor (sec. 4). That if the plaintiff recover judgment by default it shall contain a provision that if the same be not fully satisfied within five days after entry and service upon the defendant of a copy thereof, plaintiff shall be entitled to the premises and a warrant may be issued to put him in possession (sec. 5). That in such action, if the defendant raise the issue of fairness and reasonableness of the amount of rent demanded, he must, at the time of answering, deposit with the clerk of the court such sum as equals the amount paid as rent during the preceding month or such as is reserved as the monthly rent in the agreement under which he obtained possession (sec. 6). That if judgment be taken by default, the court may, under certain conditions, open such default, vacate the judgment and grant a new trial (sec. 7). That if defendant appeals from the judgment he shall, pending the appeal, deposit with the clerk of the court the amount of the judgment and thereafter, monthly, until the final determination of the appeal, an amount equal to one month's rental, computed on the basis of the judgment (sec. 8). That the act shall not apply to a room or rooms in a hotel containing one hundred and twenty-five rooms or more, or to a lodging or rooming house occupied under a hiring of a week or less (sec. 9). That the act shall not apply to a new building in the course of construction at the time the act takes effect, or commenced thereafter, and shall be in force until November 1, 1922.

I agree with the majority of the court that in determining whether or not the act be constitutional, it must be considered in connection with chapters 942 and 947, passed at the same extraordinary session of the legislature. These three acts, with others not here involved, indicate an intent on the part of the legislature to regulate rents of dwellings until November 1, 1922. Chapter 942 amends certain sections of the Code of Civil Procedure by providing that summary proceedings shall not be maintained by a landlord to recover possession of leased premises until November 1, 1922, unless it be proved that the tenant holding over is objectionable, or the landlord wants to occupy the premises for a dwelling for himself or family, or intends to demolish the building for the purpose of building a new one, or has sold it to a co-operative ownership corporation. Chapter 947 also amends certain sections of the Code of Civil Procedure by prohibiting a landlord from obtaining, during the same period, possession of his premises by an action of ejectment, except in the cases specified in chapter 942. The purpose of chapter 944, when thus read and considered, was to make tenants in possession a preferred class until November 1, 1922, by denying to the landlord, until that time, the aid of the courts to obtain possession of the premises leased, where the tenant's lease had terminated or he had defaulted in the payment of rent, providing he were willing to pay a reasonable rent, to be determined in a judicial proceeding.

This brings us to the determination of the fundamental question already suggested: Is chapter 944 as applied to leases made prior to its passage, unconstitutional? I am of the opinion that it is. *First*, it impairs

the obligation of a contract, and is thus directly in conflict with the Federal Constitution (art. 1, sec. 10). The defendant, several months prior to the passage of the act, freely, deliberately, and with full knowledge of what he was doing, entered into the renewal lease. But he can violate the agreement, because, according to the act, it is, presumptively, unjust, unreasonable and oppressive. The landlord, however, is bound. He cannot get possession of his property and must accept what the court finds to be the fair rental value. It is the substitution of a new contract which the parties never made, and to the terms of which they never agreed. Such substitution not only impairs the obligation of the contract of renewal, but destroys it, and, therefore, comes within the constitutional prohibition (*Edwards* v. *Kearzey*, 96 U. S. 595; *Effinger* v. *Kenney*, 115 U. S. 566; *Barnitz* v. *Beverly*, 163 U. S. 118; *Bradley* v. *Lightcap*, 195 U. S. 24). But it is suggested that the contract of renewal was entered into subsequent to the passage of chapter 136 of the Laws of 1920, which chapter 944 of the Laws of 1920 purports to amend. The answer to this suggestion has already been given. What purported to be an amendment, in fact operated if not as a repeal, then certainly as the substitution of one statute for the other. The two acts, when examined, will show a well-defined legislative intent to eliminate chapter 136 by substituting in its place chapter 944.

Second. It deprives the plaintiff of its property without due process of law and denies to it the equal protection of the law. It binds the landlord to give to each tenant in possession when the act took effect the right to occupy the premises for at least two years if he

so desires, but imposes no obligation to do so. The landlord must permit him to remain, while he is at liberty to depart whenever he sees fit. Not only this, but the landlord is compelled to take the rent which the court fixes as reasonable. This he must accept whether satisfied or not, and if not satisfied, then he is denied the right to regain possession of his property. The tenant, if dissatisfied with the amount fixed, may refuse to pay, and without notice quit and surrender the premises. If this does not amount to depriving a landlord of his property without due process of law, it is difficult to imagine what would (*People* v. *Smith*, 21 N. Y. 595; *Matter of Tuthill*, 163 N. Y. 133). In determining what is due process of law, regard must be had to substance and not to form (*Chicago, B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 235). The protection of property involves the protection of its value (*Southern Ry. Co.* v. *Greene*, 216 U. S. 400; *Ames* v. *Union Pacific Ry. Co.*, 64 Fed. Rep. 165). It is not difficult to see how the value of property occupied by tenants, when the act went into effect, might be very materially impaired or reduced. There is no way in which the landlord can obtain possession for upwards of two years. Indeed, he cannot sell it if required to give immediate possession.

The landlord is also denied the equal protection of the law. He must accept the fair rental value, irrespective of what the tenant has agreed to pay, while the owner of a building in process of construction, or one constructed after the passage of the act, may exact whatever rent he sees fit. The act, therefore, is not uniform upon the same class of persons. One class is compelled arbitrarily to retain tenants whether desired or not, and to accept

what the court fixes as a fair rental, while the other class may select its tenants and fix the rent at an amount upon which the parties agree. It is perfectly obvious that under the provisions of the act one who becomes a tenant after its passage might, and probably would, pay substantially more than a tenant in possession of like property in the same locality, and surrounded by the same conditions. The act was not intended to be uniform in its operations. It affected property leased when it took effect in one way, and property not then ready to be leased in another. One class was to be benefited at the expense of the other (*Willson* v. *McDonnell*, 265 Fed. Rep. 432).

Third. It takes private property for a private use. The plaintiff and defendant are private citizens, engaged in a private business. The renting of property can no more be said to be for a public use in the city of New York than can the sale of food, clothing or any other article. Of course the landlord is a "vendor of space." The baker is a vendor of bread; the butcher is a vendor of meat; the tailor is a vendor of clothes; indeed, every person who sells any kind of property is a vendor of the article sold; all are engaged in a private enterprise. But this does not give the state the right to fix the price at which the sale shall be made, unless it be for the public health, public morals, or the general welfare. If it does, there is little if anything left of the constitutional provisions relating to the protection of property and the right to contract with reference to it. The power to fix rental rates between private individuals is not analogous to nor controlled by the decisions which have upheld the power of the legislature to fix rates for service where

the owner has devoted the business affected to a public use.

In *Munn* v. *Illinois* (94 U. S. 113) chiefly relied upon by the respondent, the owner of a grain elevator had for years devoted it to a public use in handling grain for the public generally. The same principle is applied in *German Alliance Insurance Co.* v. *Lewis* (233 U. S. 389); *Union Dry Goods Co.* v. *Georgia Public Service Corp.* (248 U. S. 372); *Producers Transportation Co.* v. *Railroad Commission* (251 U. S. 228) and other authorities cited by respondent's counsel. The renting of property for housing purposes in the city of New York, as I have already said, is a private business and cannot be made public or impressed with a public interest merely by legislative fiat. Such interest cannot be created in this way or property rights be divested under the guise or pretense of the exercise of the police power. In *Producers Transportation Co.* v. *Railroad Commission* (*supra*) Mr. Justice Van Devanter, speaking for the court, said: "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, that is, to carrying for the public, the State could not, by mere legislative fiat, or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment."

The police power is not superior to the Constitution; on the contrary, it is subject to applicable constitutional

limitations (*Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146).

In *Matter of Jacobs* (98 N. Y. 98, 108) this court, referring to this power, said: "The limit of the power cannot be accurately defined and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges and private persons, and so far as it imposes restraints, the police power must be exercised in subordination thereto." See, also, *Slaughterhouse Cases* (16 Wall. 36, 87).

The statutes regulating interest are not analogous. No one would contend that the legislature would have power to pass a statute reducing the rate of interest on outstanding obligations. When interest was reduced from seven to six per cent., the statute was silent as to whether it applied to obligations outstanding at the time of its passage, but the courts held it did not apply to such contracts.

The statutes are not analogous in another respect, because there is no statute which compels a person to loan money unless he so desires. The statutes under consideration compel the leasing of property without the consent of the landlord and upon terms which the court itself determines. They are in many respects like the provisions of the act of Congress known as the "Ball Rent Law", for the relief of tenants in the District of Columbia. This act was declared unconstitutional by the Court of Appeals of the District of Columbia (*Hirsh* v. *Block*, 267 Fed. Rep. 614; certiorari denied, 254 U. S.——).

In the recent case of *Stell* v. *Mayor of Jersey City*, decided by the Supreme Court of New Jersey, and reported in 111 Atlantic Reporter 274 (No. 6 Advance Sheets), a resolution of a municipal corporation, providing that city money should be advanced to defend proceedings to dispossess tenants, was held illegal and void. Justice Swayze, speaking for the court, said: "It is enough to say that any authority of the city government to protect property certainly cannot include authority to deprive owners of property of the beneficial use thereof. The general welfare and good government of the city requires that the city should see that so far as it is concerned all of the citizens are secured their rights, and it is a manifest perversion of the very object of the statute to use the power and money of the municipality for the protection of one class of citizens at the expense of another. No doubt it is desirable that there should be houses for all citizens, but they cannot be provided legally by using, without leave, or confiscating the property of house owners. Housing can only be provided either in the ordinary commercial way, or by private charity."

I am also of the opinion that the statute is unconstitutional in so far as it attempts to confer upon the Municipal Court equitable jurisdiction. Article 6, section 18 of the State Constitution provides: "The legislature shall not hereafter confer upon any inferior or local court of its creation any equity jurisdiction or any greater jurisdiction in other respects than is conferred upon County Courts by or under this article." This inhibition is not confined to local or inferior courts created after the adoption of the present Constitution. It is equally applicable to those theretofore created (*Lewkowicz* v. *Queen Aeroplane Co.*, 207 N. Y. 290). The Municipal Court of the

city of New York is a continuation of the old District Court (*Worthington* v. *London Guarantee & Accident Co.*, 164 N. Y. 81). It is a local court of legislative creation. While it is true that it has jurisdiction of equitable defenses to the extent of defeating a plaintiff's claim, it is nevertheless true that such defense must be a defense, pure and simple, and the test is the relief asked. This act clothes the Municipal Court (in which a large percentage of the rent cases is brought) with equitable powers. It may, in effect, proceed to vacate and set aside the lease under which a tenant is in possession and then determine what is a fair rental, and having ascertained that fact, enter judgment accordingly. This is the exercise of equitable powers (*Simon* v. *Schmitt*, 137 App. Div. 625).

A statute ought not to be pronounced unconstitutional unless it clearly appears to be so. This, to me, does so appear. All citizens should have houses in which to live, but if there are not enough for all that is no reason why those who are in should be kept there and those who are out should be allowed to care and shift for themselves. The state has the same regard for one class as the other. Nor should one landlord be treated differently from another. All in the same class should be treated alike. This is what the State and Federal Constitutions require. These safeguards cannot be overthrown by the exercise of the police power, a power which no one has as yet attempted accurately to define or state just where it commences or ends. It seems to me much better to adhere strictly to the Constitution, the anchor of good, safe and sound government, rather than to embark on the sea of paternalism, the dangers of which cannot be foreseen or the perils foretold.

Entertaining the views above expressed, I dissent, vote to reverse the orders of the Appellate Division and Special Term, and grant the motion for judgment on the pleadings.

No. 731

OPINIONS

ON

CONSTITUTIONALITY

OF

EMERGENCY HOUSING LAWS ENACTED BY THE LEGISLATURE OF THE STATE OF NEW YORK

ON

SEPTEMBER 27, 1920

(CHAPTERS 942 TO 953, INCLUSIVE, L. 1920).

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Supreme Court,

KINGS COUNTY.

Special Term, Part I, October 18, 1920.

PEOPLE EX REL. WASSERMAN

v.

FAGAN.

FABER, J.—This is an application for a writ of mandamus to compel the respondent, Clerk of the Municipal Court, to issue a warrant pursuant to a final order in summary proceedings. A stay of the issuance of such warrant was heretofore granted pursuant to chapter 137 of the Laws of 1920. Such stay was proper (*Kuenzli* v. *Stone*, 112 Misc. 125). During the stay the Legislature passed chapter 942 of the Laws of 1920, the following provision of which is under consideration: "In a pending proceeding for the recovery of real property in such a city, on the ground that the occupant holds over after the expiration of his term, a warrant shall not be issued unless the petitioner establishes to the satisfaction of the court that the proceeding is one mentioned in the exceptions enumerated in this subdivision." The proceeding is not within the exceptions. The contention of relator is that this act does not include a case, such as that at bar, where a final order had been previously granted and the issuance of the warrant stayed, claiming that

the proceeding is not pending, and that said chapter 942 therefore has no application. The proceeding is pending (*Wegman* v. *Childs*, 41 N. Y. 159; *Pitt* v. *Davison*, 37 N. Y. 236; *Gold* v. *Torrance*, 19 How. Pr. 560; *Wright* v. *Nostrand*, 94 N. Y. 45; *Mulstein Co.* v. *City of N. Y.*, 213 N. Y. 314). In *Wright* v. *Nostrand* (*supra*) it is said: "It was held in the case of *Wegman* v. *Childs* (41 N. Y. 159) that an action was pending in the court wherein it was brought, until after the satisfaction of judgment therein; * * *." In *Wegman* v. *Childs* (*supra*) the court says, at page 161: "* * * The question presented, therefore, is whether within the intent and meaning of this constitutional provision a suit is regarded as pending, where final judgment has been rendered but execution of the same has not been had. I think the suit must be regarded as pending, whether the same has proceeded to final judgment or not. * * *" And at page 162: "The same construction was put upon an act of the British Parliament transferring pending suits into the Court of Exchequer. * * * The language of that act was 'As to all suits at law depending in said court,' and the Court of Exchequer held * * * that a suit in which a judgment was obtained in the Court of Great Sessions, but in which there had been no execution issued, is a suit depending in that court within the meaning of that act. * * *" In *Mulstein Co.* v. *City of N. Y.* (213 N. Y. at p. 314) the court says: "The issuing of an execution upon a judgment is a proceeding in the suit, and so are the proceedings supplementary thereto (*Wegman* v. *Childs*, 41 N. Y. 159; *Ward* v. *Roy*, 69 N. Y. 96)." The relator further contends that even though the statute be held to

affect his proceeding in the Municipal Court, it is unconstitutional, as the landlord had a property right in the final order of the court. The final order, which it may be conceded is in effect a judgment (*Ash* v. *Purnell*, 11 N. Y. Supp. 55), is "not a contract in the ordinary sense of an agreement reached between persons, to whose terms their mutual assent has been given, and it is in that sense that the word is used in the Federal Constitution (*State of Louisiana* v. *Mayor, &c.*, 109 U. S. 285). * * * But a final judgment creates and vests substantial rights. * * *" (*Livingston* v. *Livingston*, 173 N. Y. 377.) It is unnecessary to determine whether such rights extend to the remedy or process under the final order, namely, the warrant, for such rights as the relator has here, whether of contract or property, must yield to the public necessity. What was said by Mr. Justice Kelby in *Kuenzli* v. *Stone* (*supra*), in considering chapter 137 of the Laws of 1920, applies with equal force to this case and the act now under consideration. At page 130: "Chapter 137 of the Laws of 1920 was clearly enacted in the exercise of the police power of the state. Its purpose was to promote the welfare of the more thickly populated sections of the state by reason of a shortage in the supply of housing facilities. The prohibition in the Federal Constitution that no state Legislature shall pass any law impairing the obligation of contracts does not restrict the power of the state to protect the public health, public morals or the public safety, in so far as the one or the other may be involved in the execution of such contracts. * * * The legislative act under review having been passed under the circumstances above noted, it must

be held to have been a valid exercise of power, and for that reason it cannot be said that the law is void by reason of impairing the obligation of contracts." Sections 93 and 94 of the General Construction Law have not been overlooked. Those sections have no application. They contain only general rules of construction, and do not and could not prevent the Legislature from amending the law. Moreover, the enactment under consideration is expressly made applicable to pending proceedings. I am therefore of the opinion that the application for a writ of mandamus must be denied. Motion denied, without costs.

SUPREME COURT,

KINGS COUNTY.

Special Term, October 19, 1920.

JACOB L. GUTTAG,

Plaintiff,

v.

HYMAN SHATZKIN,

Defendant.

FISCH, *J.*—The complaint alleges that the plaintiff is the owner of real property and that the defendant was a tenant of an apartment therein under a lease expiring on October 1, 1920, and refused to vacate. The defendant has interposed a demurrer, and the only question raised and argued by counsel is the constitutionality of the law passed by the recent special session of the Legislature prohibiting the recovery by the owner thereof of real property used for dwelling purposes except in certain specified instances (not alleged in the case at bar) provided a reasonable rental value has been paid.

Protection of homes and housing is certainly within the police powers of the state, provided a public emergency exists which threatens the same. In enacting the statute in question the Legislature has declared in express terms that such a public emergency exists, and it is within its province to so determine (*Matter of application of Jacobs*, 98 N. Y., 98; *McLean* v. *Arkansas*, 211 U. S., 539, at p. 547; *Matter of Viemeister*, 179 N. Y., 235, p. 241). It remains for the court to consider whether the means adopted by the Legislature are reasonably adapted to the end sought (*Matter of Jacobs, supra; Lawton* v. *Steele*, 152 U. S., 133, at p. 136, 137). Until the expira-

tion of a two-year period the Legislature has prohibited the ousting of a tenant from his dwelling except in certain prescribed instances, provided the tenant is not objectionable and pays the reasonable rental value of the premises, which reasonable rental value may be determined by the court (ch. 944, Laws of 1920). It would appear that the means which the Legislature has adopted are appropriate to the end sought. The court may take judicial notice of the cause for the existing emergency, namely, a world war during which new building was halted for several years, while a large portion of the entire population was taken from its accustomed tasks and turned to war work. The disorganization which has resulted from a return to a peace from a war basis has delayed transportation of material and fuel. This condition, coupled with the scarcity of labor and materials to replace the prior accumulations exhausted by the years of war, has as yet apparently prevented even catching up with the normal building needs arising since the war and due to normal growth of population. These conditions to be coped with are accentuated in densely populated centres. It is no answer to say that no action precisely similar to the case at bar has been taken heretofore. It overlooks a fundamental attribute of the principle known as the "police power" which takes into consideration the economic and social conditions of the times. A reasonable allowance must be made for the exercise of legislative judgment, and if the matter is within the legislative discretion the court will not substitute its judgment for that of the Legislature (*McLean* v. *Arkansas*, 211 U. S., 539; *Kuenzli* v. *Stone*, 112 Misc., 125).

It follows that the demurrer should be sustained.

SUPREME COURT,

NEW YORK COUNTY.

Special Term, Part I, October 29, 1920.

WILLIAM BRANDT & CO., INC.,

v.

SOLOMON WEIL ET AL.

MULLAN, J.—On the 30th day of September, 1920, the plaintiff owned an apartment dwelling house in the City of New York, separate parts of which had been leased to and were in the occupancy of the several defendants. All the leases expired on the date mentioned, but the defendants refused to vacate, claiming the right to continuance of possession under the recently enacted landlord and tenant statutes, popularly known as the "housing laws." The plaintiff brings this action to procure a mandatory injunction dispossessing the defendants and restoring possession to the plaintiff, and this motion is for preliminary relief of a character not essentially different from that which would be ordered upon a final determination in plaintiff's favor.

The defendants make the preliminary objection that they are not properly joined. I think the point is well taken, but counsel have requested me to pass upon the other questions involved, and in view of the conclusions I have reached I am able to do this without depriving the defendants of the value of their objection for misjoinder.

Mr. Justice Faber, in passing a few days ago upon a motion substantially similar to this, expressed the view

that preliminary relief in the form of dispossession should be denied for the reason that such an order would virtually be a final determination in advance of the trial (*Lovell & Weisch Realty Co.* v. *Leggett et al.*, N. Y. L. J., October 13, 1920, p. 148). I am thus led to assume that there were some disputed questions of fact there present, but there is nothing before me here but a question of law which, of course, can as well be passed upon on this motion as at a trial.

The plaintiff's theory is that the Legislature, by abolishing (except in certain comparatively uncommon cases) all existing legal remedies that furnish the machinery for the enforcement of the right of repossession, is obliged to seek the aid of a court of equity. In form, this action is brought to compel the defendants specifically to perform their covenant to vacate at the expiration of the terms for which they held.

The statutes we are most immediately concerned with are chapters 942 and 947 of the Laws of 1920, effective September 27, 1920. These suspend, respectively, until November 1, 1922, the possessory remedies of summary proceedings and ejectment. I shall not take the time to describe analytically and at length the various statutes that together constitute the legislative programme designed to afford relief from conditions caused by the reported scarcity of housing accommodations. Described generally, that programme has no relation to the subject of providing additional housing accommodations. It has to do merely with matters relating to the persons who shall occupy existing houses and what rent they shall pay and how they shall pay it, &c. In respect of the particular feature of the programme that is directly pre-

sented for consideration in this case, it seems to be quite plain, and this view is concurred in by the learned counsel for the joint legislative committee primarily responsible for the legislation, that it was the intent of the Legislature to abolish, for the period mentioned, all known remedies (except such incidental remedies as are customarily applied in equity actions that are brought under one of the well-defined heads of equity jurisdiction) for the repossession of his property that the owner of the class of house we are dealing with could avail of at the time the acts were passed. There were only two of these, the old action of ejectment and the more modern and more frequently availed of summary proceeding. These were actions at law. Courts of equity have refused, since very ancient times, to entertain jurisdiction of actions brought for such a purpose, except in certain cases where, because of very unusual circumstances, it was apparent that complete relief could not be obtained in a law action, as, for example, *Wheelock* v. *Noonan* (108 N. Y., 179) and *Pokegama S. P. Lumber Co.* v. *Klamath R. L. & T. Co.* (86 Fed., 528). The reason for the refusal of equity courts to entertain jurisdiction of possessory actions of the common sort was that the person claiming to be entitled to possession had an adequate remedy at law, *i. e.*, either in ejectment or by way of summary proceeding. As was to be expected, therefore, the plaintiff relies upon the fundamental maxim that wherever there is a right there is a remedy, and contends that as there is for the time being no existing possessory remedy at law it is compelled to have recourse to an appeal to equity. Ordinarily the soundness of such a contention would not be open to question, but we are here concerned

with a very peculiar and, I think, wholly unprecedented situation, to which the maxim referred to does not easily apply itself. It was, as I have remarked, the object and purpose of the Legislature to suspend the operation of every known law by which the kind of recapture of real property in question here was made possible. Had there been in existence, even if it were dormant, a recognized equity action for the recovery of possession in the common class of cases we are considering, the failure of the Legislature to suspend its operation would leave it untouched, no matter what the purpose of, or what the contents of the preambles in, the acts suspending the operation of ejectment and summary proceedings. As there was no such equity action, what this court of equity is asked to do is, in effect, to create a form of action to take the place of those law actions whose operation has been suspended. But is it either the function or right of a court of equity so to nullify the legislative will? The reported cases and text treatises throw little or no light upon the subject of the existence or extent of equity power as applied to a situation like this, probably for the very simple reason that no situation at all similar to this was ever before a court of justice or conceived of by the authors who wrote on equity jurisdiction. The poorly-phrased and misleading (Pomeroy, Equity Jurisprudence, 4th ed., sec. 425, 16 Cyc., 137) maxim "equity follows the law," furnishes no practical aid, as it relates, in so far as it is at all germane here, to claims that are at law prevented, by express inhibition, from ripening into or being considered as legal rights. In the case at bar the right of ownership is not, at least directly, destroyed. The landlord is allowed to remain

the owner, but his power of possession is taken from him. We thus have the patent anomaly of a claim to whose holder the law says, "You have a legal right, but the law will not allow you to enforce it. You cannot have your property back. The law will provide something else in its place, something just as good, but, in any event, something you must take whether you will or no." A tenant who overstayed his agreed term has always been deemed, under the laws we hitherto have been familiar with, a mere trespasser, and no laws were more readily or more freely enforced than those that gave to the owner of real property the right to oust the trespasser and regain his rightful possession. Mr. Justice Washington said, for the U. S. Supreme Court, in *Green* v. *Biddle*, 8 Wheaton, 1, at 75: "Nothing, in short, can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it, when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to and interest in the property." In the same case Mr. Justice Story said (at p. 12): "How can it be said to be any title at all which cannot be asserted in a court of justice by the owner, to defend or obtain possession of his property?" But decisions of courts are scarcely needed to show that the possessory right is essential to the existence of any ownership that is not a mere name and a sham. It is neither more nor less than plain common sense that the more a man's liberty of action is curtailed or circum-

scribed in respect of his use of any given thing, the less must its value to him inevitably be; and it seems obvious that the destruction of an owner's power of recapture of possession of realty after the ending of a letting is a serious impairment of his rights. I am not, however, to be understood as expressing any view concerning the validity of the statutes under consideration, unless such a view is inseparable from the observations themselves that give rise to the inference of such a view.

I am merely directing attention to the novelty of the question whether equity can, in the circumstances such as are here present, intervene to make efficacious and real a right that the law recognizes, yet seemingly refuses to enforce. While from the researches I have made I am quite confident that nothing in the way of a precedent can be discovered, I am fairly persuaded, from the very nature of the matter, that the plaintiff's relief must be obtained, if at all, by assailing the statutes that have deprived him of the remedies to which he theretofore was entitled. For, if those statutes are valid, and it is to be held, in the name of the police power, as applied to the existing housing situation, that a man may own but shall not possess; that he may not fix the rent of his own property; that his contract right to receive his property back at the end of a letting may be destroyed; that the Legislature may abolish one of the most ancient, important and jealously guarded writs that our courts of law have ever possessed, and that the burden of relieving supposedly necessitous persons who choose to live in certain parts of the state shall fall only upon those who happened at a certain time to have their savings invested in a certain class of building in those cer-

tain parts of the state—to say nothing of the apparent withdrawal of numerous other constitutional guaranties and safeguards—I am quite clear that it would be as improper as it would be futile for a court of equity to attempt to thwart the public policy of which such statutes are presumably the expression by erecting a possessory action to serve as a substitute for those that have been suspended.

Can there be a decision in this case upon the validity of the statutes suspending the possessory remedies? That, I think, depends upon the answer to the subsidiary question whether it can be said that the laws are so clearly invalid as to require a court so to hold, despite the precise form of the particular litigation before it. The plaintiff, while persistently suggesting that the laws are unconstitutional, necessarily predicates its claim of right to come into a court of equity upon the proposition that the statutes suspending the operation of the remedies of ejectment and summary proceedings are a valid exercise of the police power; for, of course, if it admitted their invalidity it would have no standing in equity. The defendant tenants do not, naturally enough, attack the acts. There is, consequently, no party to the litigation who raises the validity question, and the only party who desires to raise the question, the plaintiff, cannot do so in this action. Because of the plaintiff's theoretical assumption of validity, it would very plainly be improper, I think, for me to pass upon the constitutional questions unless the laws with which we are concerned could be said to be so palpably invalid that not even a plausible argument could be made for them. In such a case, I could very well say that the

plaintiff still has its recapture rights at law, and deny its motion without more ado. But although it was contended upon the argument by learned counsel—not for plaintiff—that if it were the legislative scheme to suspend the operation of all existing recapture remedies (save in the excepted instances referred to), the invalidity of the scheme is too plain to admit of argument, I cannot take that view. One of the justices of this court has expressed the opinion that the rent laws, regarded as a whole, are valid (*Guttag* v. *Shatzkin*, N. Y. L. J., October 20, 1920, front page). It is true that my learned brother was there passing only upon the validity of the statute suspending the remedy of ejectment. But the views he gave utterance to were, quite evidently, those entertained by him concerning the entire legislative scheme. In such circumstances, and wholly regardless of any opinion I may personally hold, I think it is fairly plain that I am not at liberty to take up and pass upon the constitutional question upon the ground of obvious invalidity. Furthermore, although I do not fully subscribe to the doctrine that courts of first instance should go to great lengths to assume constitutionality, it is at least doubtful whether they should, unless in the most exceptional case, decide constitutionality questions when, as here, they could not be argued.

It follows that the motion must be denied. No costs.

SUPREME COURT,

NEW YORK COUNTY.

Special Term, Part III, November 3, 1920.

HEYMAN

v.

OSTERWEISS.

HOTCHKISS, J.—Plaintiff sues in ejectment. Defendant demurs for failure to state a cause of action, and plaintiff moves for judgment on the pleadings. Defendant was plaintiff's tenant. His term expired September 30, 1920, but he holds over. The motion involves the application and validity of the Laws of 1920, chapter 947, which became a law September 27, and which provides that ejectment in certain localities and except under certain circumstances shall not be "maintainable" until November 1, 1922. It is of immense importance that the series of so-called "housing" laws recently passed, and of which the above is one, should be passed upon by the court of last resort as soon as possible. It is therefore important that the decision of this motion should be promptly made. But to do this and to express my views in a formal opinion is impossible. The gist of what are strong impressions rather than mature conclusions is as follows: (1) Laws of 1920, chapter 947, does not apply to leases for terms commencing prior to September 27, 1920. (2) If construed to so apply, the act, read *in pari materia* with the other housing acts, would be unconstitutional because, assuming that the leasing

of tenements is a business charged with a public use, and as such subject to the exercise of the police power, the result of these acts is to force upon the landlord the continuance of such use and to deprive him of his right to "withdraw his grant by discontinuing the use" (see *Munn* v. *Illinois*, 94 U. S. 113-126). While I put my decision on the foregoing ground, I may properly add that I have grave doubts as to the constitutionality of the act in question when considered in the light of the legislation of which it is a part, because (1) it deprives landlords, such as plaintiff, of all remedy for the repossession of their property; it is not based upon any proper application of the doctrine of eminent domain, and cannot otherwise be sustained as a valid exercise of the police power; and, (2) it is discriminatory because as between owners of old and new buildings, and as between owners who seek to regain possession of their property for their personal use and those who seek possession for other purposes, the act denies the equal protection of the laws. Motion granted, with $10 costs, with leave to answer, &c. Settle order on notice.

SUPREME COURT,
NEW YORK COUNTY.
Special Term, Part III, November 3, 1920.

STERLING
v.
BARTON.

HOTCHKISS, *J.*—Plaintiff moves for judgment on the pleadings. The sole question presented is whether at the present time a landlord may resort to equity to enforce his tenant's covenant to quit at the expiration of his term, in the face of a defense by which the tenant avails himself of the recent housing laws. The position of the plaintiff is that his remedy at law, either by summary proceedings or ejectment, has been destroyed. He does not question the legality of the laws by which this has been accomplished; he submits to them, but he argues that since they have deprived him of all legal remedy, his right to relief in equity arises *ipso facto*. The situation is novel. Let us assume the plaintiff is right; that he has no legal remedy; does it follow that he may appeal to equity? I think not. The action is one for specific performance. In such an action jurisdiction will never be exercised if thereby injustice will be done. In the present case the court must take judicial notice of the circumstances under which the Legislature has seen fit to take the legal remedy away. It thus appears that the legislation in question was based upon the police power of the state, and was intended to meet an emer-

gency so great as to menace the health and safety of its citizens. But if a court of equity may intervene, and in such circumstances assume to give relief, the expressed intent of the Legislature will be defeated and its purpose thwarted by indirection. In short, the court is asked to exercise its equitable jurisdiction for the sole purpose of defeating the public policy of the state as declared by its Legislature. This I think it should not do and for this reason jurisdiction should be declined. Motion denied, but without costs.

SUPREME COURT,

NEW YORK COUNTY.

Special Term, Part 1, November 26, 1920.

VERSAILLES HOLDING CORP'N

v.

STEIN.

McAvoy, J.—The legislative acts known popularly as the "rent laws" prescribe the causes under which summary proceedings or ejectment may be maintained by the landlord to recover possession where a tenant holds over after expiry of term without permission. None of the causes for which the landlord may maintain summary proceedings or ejectment against a holdover tenant is within the power of the landlord here to assert, and he is thus without legal remedy, although the right to possession of the premises is withheld by the tenant without permission and indeed against a demand to forthwith remove. The lease under which the tenant holds provides that the tenant will at the conclusion or other expiration of the term of such lease deliver up possession of the premises in good order. It is demanded here by the landlord that the tenant be commanded by injunction order to vacate the premises according to his agreement. This is doubtless an equivalent to a judgment of ejectment or a final order in summary proceedings, and has no attributes which make its incidence upon the tenant any less drastic than the legal remedies which might have formerly been invoked. The Legislature, without

question, had power to abolish the remedy which it granted to recover possession of real property by summary proceedings, and would, if an emergency existed under the police power, be entitled to suspend the action of ejectment for a prescribed period. It is conceded here that the existing laws accomplishing this result are within the legislative power and asserted in effect that although the Legislature abolished legal power to remove a holdover, the equitable remedy to compel him to remove survives or arises out of the lack of a prompt, adequate and efficient remedy. This is so facile a device for avoiding the legislative policy that unless equitable considerations support the plaintiff's bill it ought not to be countenanced. Such a judgment as is here asked would be complete nullification of the acts of the Legislature without asserting their nullity in a judgment of unconstitutionality. Equity ought to follow the law in all instances where good conscience permits. In an instance where it is not asserted that there is invalidity in the exercise of legislative policy a breach ought not to be forced through equitable intervention in a protective measure which, if permitted, would avert and uproot legal sanctions declared in solemn council of the representatives of the supreme power of the state to be essential to the public welfare in a generally accepted emergency.

SUPREME COURT, NEW YORK COUNTY.

SPECIAL TERM—PART V.

ULLMANN REALTY COMPANY,

Plaintiff,

vs.

KINTARA TAMUR,

Defendant.

WAGNER, J.—The motion for judgment upon a complaint founded upon ejectment and an answer pleading in content the remedies afforded under the recent acts of the legislature of this State known as the Housing Laws, squarely presents for determination the validity of said acts in their constitutional aspect.

The averments of the complainant, a domestic corporation, briefly stated, are, that as owner of premises No. 435 East 66th Street, a dwelling house in which the defendant, a monthly tenant from September 24th, 1918, occupied an apartment, the latter has withheld the possession of the same from the complainant since September 24th, 1920; that the value of the use and occupation of the said apartment is reasonably worth the sum of $35.00 per month; terminating in a prayer for judgment for both possession of the premises and a sum representing the value of the tenant's use and occupation since the alleged date of expiration.

The answer, denying the stated value of the use and occupation, pleads as a first defense the original relationship of landlord and tenant existing at a rental rate of $23.00 per month, under a monthly tenancy, with a subsequent increase in the sum to the amount of $30.00

monthly, and the plaintiff's refusal to accept said sum tendered on September 24th, 1920, which the tenant has ever since been ready and willing to pay.

The second defense interposed consists of the allegation that on September 20th, 1920, after receipt of a notice from complainant that the rent would thereafter be increased to the sum of $35.00 monthly, the plaintiff refused to accept tender of the $30.00 offered by the tenant, with the further averment that such demand was solely for the purpose of illegally and unlawfully increasing the rent in excess of the reasonable value of the premises. For the purposes of the action and particularly this motion and in order to obviate any dispute as to what the reasonable value of the premises were as contemplated by the sections of the acts under consideration, the parties expressly stipulated in writing annexed to the pleadings, that such reasonable value at the present time and at the time of the institution of the suit, was $30.00 per month. The present motion, therefore, leads to a direct test of the validity of the above defenses and in turn the constitutionality of their enactments.

The history of the recent legislative action with respect to the subject matter of this action may briefly be summarized as follows: For the purpose of meeting and coping with what the legislature deemed a crisis as to housing conditions unparalleled in modern times and which it was convinced had reached a point of such acuteness during the year as to become a menace to the public health and safety and demanded immediate amelioration, on April 1, 1920, the legislature of this state duly assembled, under the recommendation and importunities

to be hereafter adverted to, passed chapters 130 to 139 of the laws of 1920, applicable alone to cities of the first class and cities within the county of Westchester, for a limited duration, in effect until the Fall of 1922. These measures palliating in effect and productive of a vast lessening in the pressures of the moment, proved, however, under the practical test of continued administration, but of surface relief and inadequate to meet the exigencies of the actual crisis. The situation plainly demanded immediate and more drastic treatment. There were conditions that constantly arose equally as unprovided for as unanticipated. The recurrence of evident oppression masked itself in different guise; situations at times appeared beyond the pale of the then remedial legislation. The astute advice of those learned in the meticulous observance of the rigid letter of the laws discovered ways and means of circumvention. The result was inevitably that which follows a subversion of the law's spirit to its technical phrase. Comprehension of scheme with plasticity obtainable to all contingencies that spring forth and ability to give adequate aid in whatever form the demands may present themselves, is not so easy of origination.

Accordingly, and at the insistent behest of the Mayor's Committee, which had occupied a place commanding most intimate knowledge and contact with housing affairs, the Governor's calling of a special session of the legislature, resulted in the enactment on September 27th, 1920, of the Laws of 1920, chapters 942 to 953, supplementary and amendatory of the former acts and calculated to more effectively meet the crisis still imminent and impending.

In brief the new legislation herein sought to be construed and of consequence to the proceeding at bar, is as follows:

1. Chapter 942, which regulates hold-over summary dispossess proceedings allowing the same to be instituted for four reasons, namely, (a) where the present hold-over is objectionable; (b) where the owner, being a natural person, seeks in good faith to recover the premises for his personal occupancy; (c) where the owner wishes to demolish the premises with the intention of constructing a new building; (d) where the premises have been sold to a corporation formed under a cooperative ownership plan.

2. Chapter 944 of the laws of 1920, amending chapter 136 of the laws of the same year, providing that it shall be a defense by a tenant in an action for rent "that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive."

3. Chapter 945, dealing with summary dispossess proceedings for non-payment of rent, allowing the same to be brought where the rent is no greater than the amount for which the tenant was liable for the month preceding the default for which the proceeding is brought, and that in such a proceeding the reasonableness of the rent may be tested in substantially the same manner as in the action for rent which is regulated by chapter 944 of the said laws.

4. Chapter 947, which amends the Code of Civil Procedure by adding a new section thereto in reference to the recovery of real property in an action in the Supreme Court.

The complaint on its face showing that the premises involved were used for dwelling purposes and alleging no facts bringing the plaintiff within the exceptions specified in chapters 942 and 947, as well as the evident endeavor of plaintiff to avoid the inhibitions of section 944, admitted by plaintiff's counsel upon the argument, squarely presents the questions of alleged power and right. Does the deprivation of the landlord to the right to the remedy of ejectment under article 1 of title 1 of chapter 14 of the Code of Civil Procedure, covering actions to recover real property and the denial of any claim made for any rental that might be in excess of the reasonable value of the use and occupation of the premises, under chapter 944, violate his rights under the Constitution?

The fundamental consideration at the outset, independent of any resulting power that may thereafter be applied, is one mainly of legislative propriety. If it should be found that the power exists as a lawful exercise of the prerogatives of the legislature in formulating a valid fiat to be applied to an existing emergency imperiling the welfare of the people of the state, the primary inquiry upon which their validity rests must necessarily be with respect to the actual necessity of the situation. Extraordinary statute law implies unusual need. Special demands must become so insistent that the failure of ordinary remedies but accentuates the requirement

of supplemental and additional repairment. It is only when the facts, evidence and information before it do not furnish reasonable grounds for belief that the intended legislation is conducive to the public safety, that the law-makers exceed the limits of their granted power. The legislature had submitted to it ample evidence of housing perils to justify their immediate and serious attention. The Governor of the State, by direct message, stressed the situation in the following words:

> "It has been publicly stated by the Health Commissioner of the City of New York, that this condition of uncertainty is alone a direct menace to the health and welfare of the community. The housing shortage leaves the citizen nowhere to turn; families have been broken up and dispersed generally through the city, or crowded and huddled into the homes of relatives until the health, welfare and morality of the community is seriously threatened. . . . There is an abundance of evidence that undesirability or failure to pay rent is not in the majority of instances the basis of the application for the writ of summary removal, but, on the other hand, it is the operation of the profiteer who would remove the desirable and paying tenant in order to create a vacancy which may thereafter be offered to the highest bidder. As a result of this, families have been shifted from place to place without rhyme or reason, and the unscrupulous and selfish have profited immensely by it. October 1st was to be the height of the harvest. The state should step in and use its power to disappoint them. If the present condition be not thus relieved and the health of the community continues to be menaced, then we have a grave public emergency to meet, such as would confront us in a time of epidemic or of catastrophe."

The respective reports of his Reconstruction Commission, the later constituted Joint Legislative Commit-

tee on Housing, and the specially appointed Mayor's Housing Conference Committee of the City of New York, reiterated the crying need.*

This careful, long-continued study and examination which the legislature was entitled to consider, supplemented by the facts of common knowledge, which, as to local conditions, "does not require evidence to establish its existence, but may be acted upon without proof" (*Matter of Viemeister*, 179 N. Y. 240), made it the judge of the necessity of such enactments. Whether they had a reasonable relation to the protection of the public health, safety and welfare will be hereafter considered. Whether or not its subject-matter was calculated to deal fully with the problem, or differences of opinion as to the wisdom of its scheme, is, of course, beside the mark, for it is not the court's function to determine the efficacy or wisdom of the legislative voice. Its duty is to ascertain whether, viewed in any light, a reasonable legislative discretion can regard the subsequent enactment as not arbitrary and as in the furtherance of the public interest. In this connection, in *People* v. *Griswold*, 213 N. Y. 92, the court said:

> "In determining whether statutory requirements are arbitrary unreasonable or discriminating, it must be borne in mind that the choice of measures is for the legislature, who are presumed to have investigated the subject and to have acted with reason, not from caprice. Legislation passed in the exercise of the police power must be reasonable in the sense that it must be based on reason as distinguished from being wholly arbi-

* See report of the Joint Legislative Committee on Housing transmitted September 20, 1920, pages 3/4, 5/9, 7; Department of Health Bulletin, New Series, Vol. 9, No. 42.

> trary or capricious. But when the legislature has power to legislate on a subject the courts may only look into its enactment far enough to see whether it is in any view adapted to the end intended. If it is, the court must give it effect, however unwise they may regard it, or however much they might, if given the choice, prefer some other measure as more fit and appropriate."

It is sufficient that from the various reports of committees and commissions heretofore alluded to, the lawmakers had reasonable grounds to find the existence of an emergency and the resultant endangerment of the public. Such is the legislative finding stated in prefatory declaration and persuasive to this and all courts of justice as to its warrant in the enactment of means to avert the crisis.

It would serve no useful purpose in this opinion to rehearse the facts themselves in relation to the housing situation in this city which gave rise to the legislative action. A reading of the above cited reports of the various committees are fully enlightening on this subject. The intimacy of contact by every individual resident of the community confirms the verity of their content. The appalling conditions of family life in certain sections of this community have already been the subject of judicial discussion and concern. A public menace threatening wholesale evictions had been overhanging thousands of tenants in this city; exorbitant and extortionate demands for rent had been met with the impossibility of compliance; the consequent congestion which these conditions lead to became perilous to public health, safety and morals. The condition was a breeder of discontent and such a stalker for unrest as to become an

object of apprehension as to the future good order of society.

The necessity of the remedy being apparent, it remains to consider whether the legislature was invested with the constitutional power which it has exercised. Ultimately the inquiry confronting us narrows down to the proposition whether in a time of public emergency affecting the homes and shelter of the people, endangering their health and safety, the result of an upheaval and the conditions following a world war, there exists such power and authority in governmental function as to provide that the people in the face of oppressive demands should not be summarily evicted and ejected from their homes and unprovided with shelter during the continuance of the emergency, when at all times willing and, in fact, offering to pay for the use of the premises occupied by them a reasonable rental value, and whether they should be permitted to interpose in proceedings brought the defense that the rent sued for is unjust and unreasonable in amount and oppressive in character.

Indisputable must be the observation that the "raison d'ëtre" of the very existence of a representative government such as ours and the exercise of its functions, is the protection and welfare of the people who form its component parts, and who, in fact, constitute the state. That philosophy underlies our whole system as evidenced by the avowed intentions of its creators at the time of its birth, and has formed the basis of the repeated interpretations of its powers, as the same has for over a century been the subject of discriminating study by our courts. This material protection afforded the citi-

zenry is the supreme purpose of all law and the ultimate endeavor of those in whose hands the security of the public is from time to time placed. The source of said power and the reservoir from which it flows ceaselessly with a "flexibility and capacity for growth and adaptation" (*Hurtado* v. *California*, 110 U. S. 530), is what is indefinably known and recognized as the general police power of the government. Duty to society implies that the absolute ownership of property carries with it the reciprocal duty of so managing its use that the common good and general welfare will best be conserved. As Chief Justice Shaw stated:

> "Rights of property, like all other social rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by constitution, may think necessary and expedient . . . The power is vested in the legislature by the constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or possible limitations to its exercise." *Commonwealth* v. *Alger*, 7 Cush. 84.

It would seem that its scope is boundless, impossible of accurate future limitation and requiring but one and one only foundation. It comprehends every law which in any way concerns the welfare of the public. It matters not whether rights or duties are involved. No distinction

is made between relations which may be private or public, nor of rights whether personal or pertaining to property. The validity and legitimacy of its exercise is inextricably interwoven in every case with the maxim *sic utera tuo ut alienum non laedas;* the preservation of the health, welfare and morals of the public is its constant aim; every matter thereto essential, it includes; to every great public need, it extends its arm. *Caufield* v. *United States*, 167 U. S. 518. Its comprehension of everything pertaining to the government's solicitude for the welfare of its people, is perhaps nowhere better stated than in the case of *Lawton* v. *Steele*, 152 U. S., at page 136, where the court said:

> "It is universally conceded to include everything essential to the public safety, health and morals and to justify the destruction or abatement by summary proceedings of whatever may be regarded as a public nuisance. Under this provision it has been held that the state may order the destruction of a house falling into decay or otherwise endangering the lives of passers-by; and the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restrictions of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane, or those affected with contagious disease; the restraint upon vagrants, beggars and habitual drunkards; the supervision of obscene publications, houses of ill-fame and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere whenever the public interests demand it, and in this

> particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what means are necessary for the protection of such interests."

In the *Slaughter House Cases* reported in 16 Wall., 36, the same court in their opinion and discussion of the police power possessed by the several states, and with a far-sighted view of the evils that naturally could arise to the inhabitants of over-crowded places, said:

> "This power is and must be from its very nature incapable of any exact limitation. Upon it depends the security of sound order, the life and health of the citizens, *the comfort of and existence in a thickly populated community*, enjoyment of private and social life and the beneficial use of property; 'it exists,' says another eminent judge, 'to the protection of the lives, liberty, health and comfort and equity of all persons and the protection of all property within the state . . . . and persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, life and prosperity of the state. Of the perfect right of the legislature to do this no question ever was, nor upon acknowledged general principles can ever be made, so far as natural persons are concerned.'"

I cannot subscribe to any doctrine that hinders, or restrains our legislative power from enacting a clear and reasonable design to relieve the actual distress of the thousands of tenants in this community who would otherwise be made homeless. I think their rights to homes in which to live, during an emergency of the kind which now confronts us, is transcendently paramount to any private rights of property. The protection of their health and morals commands a vastly more important position to my mind, and of far greater moment to the

welfare of the state, than any strict adherence to the individual's private rights. Exposure, disease, misery would be the natural consequence and disaster to ensue if owners were permitted to turn the occupants of their houses into the streets upon the latter's inability to meet the oppressive and excessive demands that are now constantly and as a matter of public knowledge being made. With a clear grasp of the probabilities of the situation the legislature said that temporarily and during these unprecedented conditions the absolute right of owners to deal with property which they have hitherto used in the express business of sheltering and housing the public, must bow and submit to regulation. Our constitutional government is not an impotent one. Not so readily can its arms of protection for those whose benefit it is imposed, be bound and helpless; its scope and vision is wide; its power flexibly adaptable; its aim the protection of human rights. Our law-making body is restrained alone by the rule of reason as to the means adopted for the accomplishment of its purposes. To deny it such powers would be subversive of the principles upon which it was founded and of the postulates of dedication its creators avowed. It would deservedly be an indictment against and a reproach to our entire system of government. *Salus populi suprema lex.*

This fundamental concept permeates our entire law. "If it be within the power of the legislature to adopt such means for the protection of the lives of its citizens [referring to cases where the hours of labor in certain occupations were limited] it is difficult to see why precautions might not also be adopted for the protection of

their health and morals. It is as much for the interest of the state that the public health should be preserved as that life should be made secure," said our Supreme Court in *Holden* v. *Hardy*, 169 U. S. 366.

The court of last resort of our own state in *Matter of Petition of Cheesebrough*, 78 N. Y. at page 236, has thus referred to the state's inherent power in times of emergency: "The police power possessed by the state and conferred by it upon municipal corporations, is very broad and far-reaching and it is impossible to place upon it any precise limitation. By its exercise in many cases rights of property and of person may be interfered with and largely impaired without any compensation. Nuisances may be abated by private persons without any liability for damages and by the public without making any compensation, because no one has the legal right to maintain a public nuisance. In cases of actual necessity, as that of preventing the spread of fire, the ravages of a pestilence, the advance of a hostile army and any other great calamity, the private property of an individual may be lawfully taken, used or destroyed for the general good without subjecting the actors to personal responsibility. In such cases the right of private property must be made subservient to the public welfare and it is the imminent danger and the actual necessity which furnish the justification. *Salus populi suprema lex.*" *Plate Glass Co.* v. *Meredith*, 4 Penn R. 774; Potter's Dwarris on Statutes, 444; Cooley's Constitutional Lim. (4th Ed.), 713; Dillon on Mun. Corp., section 93-95; Sedgwick on Constitutional Law, sections 423, 473.

Technical and ordinary rights can thus be temporarily interfered with or appropriated; necessity is its justification; the public welfare its basis. Bowed in submission they stand suspended until the necessity passes away. It is but then that they take form again and are entitled to recognition.

Litchfield v. *Bond*, 186 N. Y. 73, is a restatement of the rule:

> "It is to be observed, moreover, that the police power which is concededly an inherent attribute of sovereignty, should be permitted to over-ride or nullify our constitutional limitations only in cases of the highest public necessity; that governmental power, like every other, is subject to the constitution, and when it is paramount it is because it is not limited by the constitution, or because some other immediate and over-ruling emergency calls for the application of the maxim *salus populi suprema lex.*"

A condition of affairs existed concerning which our legislature exercised its granted right to enact laws for the protection of the health and welfare of its people. If the end be a legitimate one, all means, which are not arbitrary and oppressive, but are appropriate and reasonable and adapted to that end, are within the legislative grant of power. I think there can be little doubt that the enactments in question bore a just relation to the protection of the public within the scope of its power, and were reasonable and appropriate in character. The owner receives adequate compensation for the use of his property. If at the time of demand for increase he considers his return too low, the act affords him a means of recovery for "a fair and reasonable rent for the premises." Where he *bona fide* desires it for his own imme-

diate use, no obstruction is placed in his way. In the event of a tenant's failure to pay any rent at all he is given a prompt and efficient remedy; in fact, the act (see sections 5 and 6 of chapter 944) affords him a novel and extraordinary remedy, namely, the right to a warrant if a previous money judgment for rent or value of the premises is not paid with promptness. It makes as a condition precedent to the tenant's availing himself of the statutory defense, the requirement of his payment into court of a sum equal to the last month's rent. The only impairment of any property right heretofore appertaining is, during the continuance of the crisis, that of the right to evict and eject where the tenant has no other alternative than involuntary submission to extortionate demands. Instead of an entire deprivation with reasonable compensation, as admittedly would be the owner's return under the self-same police power exercised under the guise of eminent domain, here he retains title and receives a reasonable return therefrom. I think it unquestioned that this precise emergency would have justified the condemnation of lands and leaseholds for the purposes of shelter on payment of just compensation. The state here exacts even less from him. The same purpose though is achieved. The state obtains means of shelter for its inhabitants; the property owner ample and reasonable compensation for its use, adequately secured.

The right to set up a defense of a demand for oppressive rent is no novelty in the law. Statutory form given by the act to a right always existent lends to it no extra color or potency. Freedom from restraint, co-

ercion and duress, is but a re-statement of the primary purpose of the police power. The governmental duty of protection against those in whose hands lay the instrument of oppression is co-extensive with that against all other perils of life and safety. We find it aptly stated in the *Hardy* case, *supra*:

> "But the fact that both parties are of full age and competent to contract, does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract should be protected against himself. The state still retains an interest in his welfare however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual life, safety and welfare are sacrificed or neglected, the state must suffer." (To same effect see *People* v. *Schweinler Press*, 214 N. Y. 395.)

Tenants here were constrained by the owner's power; they were confronted by disaster due to pecuniary inability of compliance; there was no range afforded them for the free exercise of judgment. All things led to the imposition of unfair conditions. Under such circumstances equity has ever given relief. Feeble tenantry never lacked the protection of the state. (See Gibbons' History of the Roman Empire, vol. 4, page 499, Harper ed.; see discussion in *Van Dyke* v. *Wood*, 60 App. Div. 212.)

The case was not, as has been urged upon me with considerable sincerity of argument, one where one of the parties to a contract is bound, while the other can at will relieve himself from its obligation. The principle of mutuality implies an equal opportunity of bargain-

ing. It can never obtain so as to place the perpetrator of oppression in a position where he can exact or extort inequity.

Moreover, the statutes in only permitting the tenant to remain in possession upon condition that he pay the reasonable rental value, whatever its enhancement in amount might be, give express effect to the anciently recognized right or equity or "chance", in other words, the tenant's equitable right of renewal. In England it was formerly held that the fact that the tenant's name was on the rolls of the manor "built him by slow degrees a fortress against unjust exactions and summary ejectments." Montgomery, Land Tenure in Ireland, pages 90 and 91.

O'Brien declared: "In England the tenant farmer was encouraged to improve his land knowing that at the expiration of his lease he would be granted a renewal at a reasonable rent." (Economic History of Ireland in the 18th Century, page 68.) The fight for recognition of this right was sharp and bitter as evidenced by the history of land tenure in those countries, but the evolution was sure and ultimately secured the sanction of statute law. (See Report of Bessbrough Commission, appointed in 1881, and Irish Land Act of same year.)

The tenant's right of renewal in equity was very early litigated in *Boyle* v. *Lysaght*, Vernon & Scrivens Rpts., vol. 1, 1786-88, pages 142-6. The Lord Chancellor referred to the great difficulties that arose in courts of equity concerning leases, saying:

> "It happened that tenants neglected to make renewals upon the fall of the lives and were guilty of great laches; landlords thereupon brought eject-

> ments and the tenants resorted to courts of equity for relief; the courts of equity, where the breech was made up by an adequate compensation, thought that they were entitled to relief . . . Courts of equity were very glad to lay hold of that rule and in every case that came before them afterwards they held that the tenant was entitled to a renewal upon those terms, except in cases of fraud or dereliction."

See also *Murray* v. *Bateman*, Ridgeway's Cases in Parliament, 187, where the reversal in the House of Lords resulted in the passage of the act of 19 and 20, George III, 1779-80. To the same effect see later statute of 6th Edw. VII (1906), chapters 5 and 6, and Scotch Small Landholders Act of 1911 (1 and 2 Geo. V, Statutes, vol. 49, page 237, sec. 32).

Even of more recent date are chapter 97 of the acts of 1915, 5 and 6 Geo. V, dealing with the housing situation, which are of compelling interest. Section 1, subdivision 3 therein, provides:

> "No order for the recovery of possession of a dwelling house to which this act applies, or for the ejectment of a tenant therefrom, shall be made so long as the tenant continues to pay rent at the agreed rate as modified by this act and performs the other conditions of the tenancy, except on the ground that the tenant has committed waste, or has been guilty of conduct which is a nuisance or an annoyance to adjoining or neighboring occupiers, or that the premises are reasonably required by the landlord for the occupation of himself, etc."

Even without statute the Supreme Court of Maryland in 1876 gave force to the rule in *Banks* v. *Haskie*, 45 Md. 207. The tenant had been guilty of laches in failing to renew the lease, and five months after an action

of ejectment had been brought he filed a bill in equity (a little more than three years and nine months after the expiration of the original term) to enforce his right of redemption. The court held:

> "The long use of this species of tenure by our people, the vast amount of property held under it and involved in and to be affected by the general principle which our courts may establish as controlling the right of renewal of such leases have, as appears to us, raised a local equity here equally strong in favor of the lessees as the like facts and circumstances more than a century ago raised in Ireland—an equity which we cannot overlook or disregard and which constrains us to follow and adopt the more liberal principles and practice of the Irish courts in such cases. In so doing we are in no wise making new agreements for the parties in these cases, but simply enforce the carrying out of what we understand to have been the original intention of the parties to such instruments and make them subserve the purposes which they were originally designed to accomplish."

Renewal upon fair and equitable terms in the absence of fraud and objectionability was the underlying principle upon which the noted case of *Mitchell* v. *Reed*, 61 N. Y. 123, was based. There the court gave full recognition to the rule:

> "It has long been an established practice to consider those who are in possession of lands under lease for lives or years as having an interest beyond the subsisting term and this interest is usually termed the tenant right of renewal, which, though according to language and ideas strictly legal, is not any certain or even contingent estate but only a chance, there being no means of compelling a renewal, yet is so adverted to in all transactions relative to leasehold property that it influences the price in sales and is often an inducement to accept of it in mortgages and settlements

> . . . This 'tenant right' of renewal, as it is termed, however imperfect or contingent in its nature, being still a thing of value, ought to be protected by the courts of justice, and when those who are entitled to its incidental advantages, whether by purchase or through derivation, are disappointed of them by fraud, imposition, misrepresentation or unfair practices of any kind, it is fit and reasonable that those injured should have redress. Accordingly, courts of equity have so far recognized the tenant right of renewal as frequently to interpose in its favor by decreeing that new or reversionary leases given by means or supposition of the tenant right of renewal, should be for the benefit of the same persons as were interested in the ancient lease, and those who procured such new leases and were lawfully possessed of them, should be trustees for that purpose."

It is clear that these statutes are but an embodiment of the above doctrine. They are but emphatic memorials of long-standing custom and restraint, evidenced by Irish, Scotch, English, Maryland and New York precedents. To hold otherwise and nullify their salutary purposes would be closing our eyes to what has for hundreds of years been recognized. To deny such remedy would amount to a reversion of our law to a regime of antiquity.

Historical reference to the growth of the law with reference to callings and trades, clothed with such a relation to public necessity and use as to render them subjects of general concern, affords further support of the present acts' validity. Occupations and trades of farriers, millers, tailors, bakers and the like in olden times, it was observed, if left unregulated, would practically become unlimited in their power to prey upon the people

in the exaction of returns. Economic conditions investing them with a degree of interest to the public, the latter possessed an interest in their use. *Munn* v. *Illinois*, 94 U. S. 113, was the first definite announcement of the principle here, though from the standpoint of precedent clouded with a certain doubt as to whether the decision was not entirely based on the principle of a monopoly. However, by degrees the doctrine, if initially impregnated upon this foundation, broke away (see *Budd* v. *New York*, 143 U. S. 517) until it took its true position in *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, where the true principle was finally laid down. The court there said, in speaking of this character of cases:

> "They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern, and be subject in consequence to governmental regulation, and they demonstrate, to apply the language of Judge Andrews in *People* v. *Budd* (117 N. Y. 1, 27), that the attempts made to place the right of public regulation in the cases in which it has been exerted and of which we have given examples upon the ground of special privilege conferred by the public on those affected cannot be supported. 'The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.'"

We see its application in the regulation of such private and competitive callings, without special legislative permit, as fire insurance, grain elevators, laundries and bread baking (*Munn* v. *Illinois, supra; Budd* v. *New York supra; German Alliance Fire Ins. Co.* v. *Kansas, supra; Oklahoma Operating Co.* v. *Love*, 252 U. S. 331; *Mobile* v. *Yuiler*, 3 Alabama N. S. 140).

Can it be given application in the above cases and denied in the instant case? If they were the subject of public interest to an extent warranting governmental interference, surely in this time of housing shortage the state is not pre-empted of power to shelter its people. I see no question of public interest in those cases superior to that appearing in the case at bar. The legislature is the unrestricted agent of the people; it possesses their full power. Surely the sovereign people are not helpless in a situation fraught with such imminent danger. Government is more than an empty form; assuredly it is clothed with adequate powers of remedy and protection to meet the demands of emergencies as they arise. "It would be a bold thing to say that the principle [warranting public regulation of private property and business] is fixed, inelastic, in the precedents of the past, and cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses today." *German Alliance Ins. Co. v. Kansas, supra.*

The most recent decision on this subject, as yet unreported, is that of the District Court of the United States, for the District of Indiana (Baker and Evans, Cir. JJ., and Geiger, D. J.) in the case of *American Coal Mining Co. v. The Special Coal and Food Commission of Indiana*, decided September 6th, 1920, where emphatic approval was given to the legislative exercise of the police power in the creation of a Coal Commission with

authority to fix charges and reasonable prices at which coal should and must be sold within the State of Indiana. The act was passed on the assumption that coal had, by reason of shortage and emergency, become a commodity in which the public had an interest, and which the state therefore had a right to regulate in that interest. The court held the act constitutional and declared that the state had the power to effect and regulate the coal-mining business. In the course of its opinion it said:

> "There is no distinction as to the source of power of regulation. It all comes from the police power, dividing that into the two subject matters upon which the police power operates—the one based upon the public franchise or the like, and the other, upon abuse of the theretofore existing right of private contract or private property—when in the one case you find that the evil to be cured is extortion and the remedy is price regulation, then in the other case, when extortion is also found to be the evil, you should apply the known remedy for extortion. The power is one; the evil is the same evil; and the remedy is drawn from the same reservoir, though from different faucets. There is no infringement of the right of a man to hold property if under the power of eminent domain it is taken from him for a public use and the fair value of it is paid him. That is a constitutional thing and there is no objection to it. So, when it comes to regulating the returns that he shall receive from his property, that is not taking his property; it is simply a control of his property as an instrument in his hand, with which the legislature has found that he has been bludgeoning the people."

Sharp assail is made against chapter 947, which for the period of two years suspends the remedy of ejectment in holdover cases after the termination of leases,

the reason for its enactment being tersely stated as follows, in the Joint Legislative Committee's explanatory note:

> "The summary proceeding of holdover being taken away, a landlord can begin an action in the Supreme Court and recover judgment against the tenant by default in twenty days, and thus defeat the purpose of the legislature abolishing holdovers except in three instances."

The ground of the objection seems to be based upon the claim that there results a partial destruction of the full jurisdiction of the Supreme Court granted by section 1 of article 6 of the Constitution of the State of New York, providing that "the Supreme Court is continued with general jurisdiction in law and equity."

In other words, the contention is, in the main, that no existing remedy whatsoever can be suspended, impaired or taken away, whatever the considerations as to public health, safety and welfare may be at the time pressing themselves for expression to the legislative mind. I find no succinct or direct expression of such a proposition in the Constitution itself, nor any implication pointing to such an inference. On the other hand, I find direct inference to the contrary, and, as plain as I think language could express the framers' intention, that remedies should not be indestructable and fixed in form, but may, at the will of the legislature be changed, suspended, or even destroyed.

Section 16 of article 1, reads:

> "Such parts of the common law and of the acts of the legislature of the Colony of New York as together did form the law of the said colony on the 19th of April, 1775, and the resolutions of the

> Congress of the said colony and of the convention of the State of New York in force on the 20th day of April, 1777, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same."

It follows that a holding to the effect that article 6, above alluded to, bars the law-making body in the exercise of its governmental authority from suspension or abridgment of a remedy which was theretofore obtaining, would be tantamount to the complete nullification of a power clearly expressed in the Constitution itself. Of course, such is not the true construction of that instrument, nor is it the law. The question has already been before the Court of Appeals in *Matter of Stilwell*, 139 N. Y. 337. It was disposed of in this way:

> "The general jurisdiction conferred upon the Supreme Court by the Constitution does not operate to prevent the legislature . . . from changing the common law or from regulating or altering the jurisdiction and proceedings in law and equity in the same manner and to the same extent as had been exercised by it before the Constitution of 1846 was adopted."

The contention, if meritorious, would make irremovable and unamendable every right and remedy now existing, however strong the demand for change might be. It would make binding upon us and all future generations living under totally different circumstances and subject to changed economic laws, the judgment of the past applicable to other conditions as enacted in statutory form. No matter what the development or change,

how strong the pressure, how insistent the demands for relief, a growing people would forever be subject to a decadent, antiquated and outworn system of remedial forms.

The history and development of our procedures bears convincing evidence that such contention is based upon neither authority nor principle. Examples thereof abound. I might take occasion to refer to one that has been called to my attention. Section 1780 of the Code of Civil Procedure forbids the Supreme Court to take jurisdiction over certain causes of action brought against foreign corporations by non-residents of the state. Prior to this law the Supreme Court had exercised jurisdiction in this class of cases in its discretion; the new act absolutely divested it of that discretion. Its validity was challenged upon this ground in *Pague* v. *N. Y., S. & W. R. R. Co.*, 157 App. Div. 302, where the court, in overruling the contention, said:

> "Nor do we think that Section 1780, as aforesaid, so far as it regulates the exercise of the general jurisdiction of the Supreme Court, may be challenged properly as an attempt to deprive the said court of some part of its general jurisdiction conferred upon it by the Constitution. (Article 6, section 1.) The courts of this state are not bound generally to assume jurisdiction of causes of action arising outside of the state which exist only between parties not residents of the state. (*Collard* v. *Block*, 81 App. Div. 582). The provisions of section 1780 as aforesaid, disclose the public policy of this state as to actions by non-residents against foreign corporations and in making the decision the legislature did not exceed its power." See to same effect *People ex rel. Crane* v. *Hahlo*, 228 N. Y. 309; *People ex rel. Ryan* v. *Green*, 58 N. Y. 295.

The purpose and intent of the framers was not the perpetuation of any given remedy, but the continuance of this court as a court of general jurisdiction over all remedies which at any time exist. There is no prohibition of exercise of the police power preventing it from barring any particular remedy. The effect of chapter 947 is simply that an action of ejectment is still maintainable in the Supreme Court in all cases where the public interest does not require its temporary suspension. Being a procedural regulation it follows that "Statutes regulating legal remedies are generally construed as operative upon an existing condition of things, as well as upon conditions to arise after the enactment." *Laird* v. *Carton*, 196 N. Y. 169; *Sackheim* v. *Pigueron*, 215 N. Y. 62.

The defendant was in possession on September 27, 1920. The law provided that after that date no tenant then in possession should be evicted unless within the specified exceptions. No facts being alleged which would bring the landlord under these exceptions, the remedy of ejectment must be denied.

Insistent stress is made against the validity of the laws in question in respect to the claim of constitutional restraint against not only the impairment of contractual rights, but the ability to contract as one deems expedient. Unquestionably both results entail this, but without defying constitutional limitations. The grant of power implies its application to a given status. Regulatory provisions must perforce, to a certain extent, create disturbances and changes in existing rights. By the same token, they prohibit or restrain former per-

missible latitudes of use. The mutual concessions thus made by the individual form the sum and total of the common good for all. As has been frequently stated, underlying and qualifying every individual right are regulatory requirements made for the public interest. *Hadacheck* v. *Los Angeles*, 239 U. S. 334; *People ex rel. Nechamcus* v. *Warden*, 144 N. Y. 529. All rights are thus dependent and of a subservient character. Thus, in the *Legal Tender Cases*, 12 Wall, 551, the rule was at an early date defined:

> "As in a state of civil society property of the citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government and no obligation of the contract can extend to the defeat of legitimate governmental authority."

Alteration and even total destruction have thus resulted from its legitimate exercise. All contracts are made in the light of such possibility. Otherwise the police power—that salutary, ever-present supervision of the governmental eye—might at random by individual contracts entered into be so confined, restricted and circumscribed as to render it powerless. The powers of the state in this respect are not subject to estoppel by private parties. *The Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U. S. 372; *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467; *Douglass* v. *Kentucky*, 168 U. S. 488; *People ex rel. Village of Glens Falls* v. *P. S. C.*, 225 N. Y. 216; 12 Corpus Juris, pages 991-3.

Numerous authorities may be cited where after a holding that a law was passed in the public interest and

was reasonably calculated to subserve it, the exercise of the police power not merely interfered with, but impaired to a great degree and even destroyed contractual rights. To comment upon these would unreasonably lengthen this opinion. Their authority is clear and absolute. The following excerpts from the recent case of *Union Dry Goods Co.* v. *Georgia P. S. C.*, *supra*, and *Erie Railroad Co.* v. *Willis*, 233 U. S. 685, will suffice. In the former the court said:

> "That private contract rights must yield to the public welfare where the latter is appropriately declared and defined and the two conflict, has been often decided by this court. Thus in *Manigault* v. *Springs*, 199 U. S. 432, 480, it was declared that 'it is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from properly exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between indidivnals may therefore be effected.' . . . In *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 558, the court said: 'It is settled that neither the "contract clause" nor the "due process clause" has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.'"

In the latter the court said:

> "Liberty of making contracts is subject to conditions in the interest of the public welfare and which shall prevail—principle or conditions—cannot be defined by any precise and universal form-

> ula. Each instance of asserted conflict must be determined by itself and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public."

This contention, of course, is unrelated entirely to the subject matter of the present suit where the tenancies are monthly, or from month to month, as the pleadings here show the tenancy at bar to be. The statutory defense may therefore be set up against excessive rents. The relation existing on September 24th, 1920, between the parties was based, not upon a contract made prior to that date, but upon a renewal thereof from month to month, and was in the minds of both parties made in contemplation of the existing law of April 1, 1920, then in force permitting the interposition of such a defense.

As to the individual's liberty to contract the well-established law presents no obstruction to the state's use of the police power. To contract as one chooses or do as he wills never was the individual's absolute right. The boundaries of one's power to contract though broad still have limitations. As stated in *Chicago B. & Q. R. R. Co. v. McGuire*, 219 U. S. 549:

> "The guarantee of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

The challenge raised that the acts offend the due process clause of the state Constitution and the 14th amendment of the Federal Constitution, is met by the

interpretative observations of the court of last resort to the same effect respecting property rights. The cases universally denominate such taking as a taking by due process of law. *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Eberle* v. *Massachusetts*, 232 U. S. 700; *Lincoln Trust Co.* v. *Williams Building Corp.*, 229 N. Y. 313; *Tenement House Department* v. *Moeschen*, 179 N. Y. 325; *Cockcroft* v. *Mitchell*, 187 App. Div. 189. It was stated in the latter case:

> "It is also true that in many instances, clearly so in the case at bar, compliance with these provisions may entail hardship upon the owners of buildings which, at the time of their erection, fully complied with all existing provisions of law. Hardship, however, does not mean confiscation, and unless it results from an unreasonable exercise of arbitrary power on the part of the legislature, no degree of hardship can justify the court in nullifying legislative enactments embodying the will of the people, since it is the primary duty of the legislature to meet the common interests of the whole people even at the expense of personal or local interests."

Vested property rights are therefore not at all times absolute and without limit. The law demands regard for the rights of others and allows an incidental injury, if not arbitrary, and in direct furtherance of the public good. See also to the same effect, *Chicago B. & Q. R. R. Co.* v. *Drainage Commissioners*, 200 U. S. 561.

Repugnancy to the Constitution is claimed in that the acts constitute class legislation and make unreasonable and arbitrary distinctions between persons and different classes of persons and grant special and exclusive privileges and immunities for the benefit of certain ones. It is argued that they operate not on all rental property,

but alone upon dwelling houses, in that respect effecting a virtual discrimination. Obviously, no extensive discussion is required to point out the distinction between the ordinary dwelling house, where persons make their permanent homes, and hotels and rooming houses, mainly occupied by transient guests. The one is not comparable in importance, so far as it is a matter of public concern, to the other. The evil aimed at had its root in the one. To it alone the legislature properly addressed its attention. Indeed, similar classifications relating alone to residential property have been upheld by our courts. *Cusack Co.* v. *Chicago*, 242 U. S. 526; *Welsh* v. *Scasey*, 241 U. S. 91. Discriminating between a holdover tenant who is in fact, objectionable, and one who is not, is plainly reasonable. Permitting a natural person to retake possession for his own use, while denying the same right to a corporate owner, simply recognizes the fact that only natural persons need homes.

Upon principle all regulation must needs in turn classify either persons, business or property. In that respect the law-making power is supreme. It can and does take up each class and apply to it different rules. Its only limitation is a forbiddance of exercise where the legislative action is inconceivable as resting upon reason and fact. *Price* v. *Illinois*, 238 U. S. 446; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157; *Lindsley* v. *Nat. Carbonic Gas Co.*, 220 U. S. 661; *People* v. *Havnor*, 149 N. Y. 195.

The Constitution only requires that those similarly situated shall be treated alike, not that all shall be subject to the same regulations. Where the circumstances differ the laws applicable may also differ. In the in-

stant case all within the same class are alike affected and only different classes of persons, under different conditions, are subject to appropriate discriminations. The classification may rest upon even narrow distinctions, said the court in *Rast* v. *Van Deman and Lewis*, 240 U. S. 342:

> "It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare. *Eubank* v. *Richmond*, 226 U. S. 52, 59. And we repeat, 'it may make discriminations if founded upon distinctions that we cannot pronounce unreasonable and purely arbitrary.' *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62."

Nor is applicability to cities of a million or more, or cities of the first class and counties adjoining, a denial of an equal protection of the laws. The menace existed entirely in densely populated sections. The emergency had to be met where it raised its threatening head. *People ex rel. Armstrong* v. *Warden*, 183 N. Y. 223; *Tenement House Dept.* v. *Moeschen*, 179 N. Y. 325; *People ex rel. Einsfield* v. *Murray*, 149 N. Y. 367.

It may not be amiss to revert to recent observations made by several of my brothers, solely by way of *dicta*, as to the purport of these laws. It is observed by one that the statutes in effect deprive the dwelling house owner of his "right to withdraw the grant by discontinuance of the use", at the same time admitting that the business of leasing tenements is charged with a public use. Such contention clearly minimizes the extent of the police power to a point of virtual uselessness. On the other hand, *bona fide* intent of withdrawal is both recog-

nized and given aid by the acts in question. Should the landlord wish to tear down his house or use it for personal purposes or grant it over to a co-operative group, who might desire to maintain it themselves, no former remedy is withheld from him. Both ejectment and summary proceedings are at his command and he can complain of no possible abridgment of remedy. If it is the absolute and arbitrary use of the premises, inimical to the interests of the state and its people with no inequitable burden cast upon the owner, that is referred to in the observation noted, the statutes accept the challenge and under the authorities heretofore mentioned are clothed with full and complete constitutionality.

Another has commented upon the inevitable lessening in the value of the use of property where the liberty of one's action regarding it is curtailed, as indicative of offense against constitutional rights. In the first place, the claim totally ignores the scope of the police power where the interests of the public require a curbing of hitherto unrestricted rights; and, secondly, that the reduction of the value of property, or its use, is insufficient of itself to invalidate the legislation. Deprivation in value does not constitute an invasion of the constitutional guarantees given to citizens (*Eberle* v. *Massachusetts, supra; Mugler* v. *Kansas,* 123 U. S. 623; *Boston Beer Co.* v. *Massachusetts,* 97 U. S. 25).

Hirsh v. *Block,* 47 Wash. Law Reports 378, where a divided court in the District of Columbia construed a statute relating in part to housing conditions and held the same unconstitutional, is cited against the validity of the present acts. I regard the case as of no conse-

quence or authority in the present inquiry. There it was attempted to regulate all rental property—stores, offices and hotels, as well as dwellings—and more important—the statute expressly denied the right of trial by jury to owners in the prosecution of their claims for increased rentals thereof. The case involved only the right to possession of a store to be used for purely business purposes and entailed a denial of the undoubted right to a jury trial, I think it evident that the decision was correctly made, and of no controlling import in the one at bar.

To summarize the above considerations would serve no useful purpose except of emphasis. Our Constitution is not so inflexible, unyielding and immovable, that our law-making bodies lie prostrate at its feet, powerless to give legislative succor in the face of a peril threatening the health, morals and even the lives of the people.

For a century and a half our constitutional restraints have received interpretations befitting every emergency and public need. The statutes in question were enacted to avert a crisis. No constitutional right of the owner of property was transgressed. No sound reason is advanced why the governmental aid was not lawfully exerted.

Motion for judgment upon the pleadings denied with appropriate costs.

SUPREME COURT,

NEW YORK COUNTY.

PEOPLE OF THE STATE OF NEW YORK on the relation of BRIXTON OPERATING CORPORATION,

Relator,

v.

EDWARD B. LA FETRA, a Justice of the City Court of the City of New York,

Respondent.

GIEGERICH, J.—The relator seeks a peremptory mandamus requiring the respondent, a justice of the City Court of the City of New York, to sign, issue and deliver to the relator a precept initiating a summary proceeding based upon the ground that the tenant was holding over after the expiration of his term. Prior to making this motion for a mandamus the relator applied to the respondent for such a precept, which was refused on the ground that the proceeding proposed by the relator was not one of those authorized and provided by chapter 942 of the Laws of 1920. The motion is opposed by the corporation counsel on behalf of the respondent, and by the attorney-general, by special deputy attorneys-general, and by counsel for the Joint Legislative Committee on Housing. The briefs devote attention chiefly to the constitutionality of the statute above referred to, which, with other related statutes, popularly known as the Rent and Housing Laws, being chapters 942 to 953 of the Laws of 1920, were enacted at an extraordinary session of the Legislature on September 27, 1920. Chapter 942, cited by the respondent justice in denying the application for a precept, sus-

pended, for a period of about two years, in the City of New York, and in cities in counties adjacent thereto, the remedy of summary proceedings to recover possession of real property on the ground that the tenant was holding over his term, except where the proceeding was based upon one of four grounds: (1) That the person holding over is objectionable; (2) where the owner seeks to recover the property for his personal use; (3) where the purpose is to demolish the existing structure in order to rebuild, and (4) where the building has been sold under a co-operative form of ownership. The reasons why the laws above referred to were enacted are well known. The war had stopped all construction of dwellings. All the energies and resources of the country had been turned to war purposes. Even before we entered the contest increasing costs of building had brought about an almost complete cessation of construction. After the war ended the prohibitive costs continued, and even grew worse up to the time these laws were passed. The consequence was therefore that the normal building operations necessary to keep pace with the needs of the rapidly increasing population of the city had been suspended for several years. The consequence was that the lack of housing space became extreme and distressing. Rents had gone up by leaps and bounds. Overcrowding to such an extent as to endanger health and morals resulted. There was great social unrest and discontent. The culmination was reached in September, 1920. In the April previous remedial legislation had been attempted, but it had worked imperfectly and had not accomplished its purpose. In September dispossess notices in unprecedented numbers all through the city had been served for October 1, the

day on which most leases of dwellings in this city termi-nate. A panic fell upon the people, because those threat-ened with eviction could find no other place to go, and there was danger that thousands of families would be turned out into the streets. At this juncture of affairs the Legislature was called to an extraordinary session by the governor, and the group of twelve statutes, of which chapter 942 above referred to is one, was enacted. In support of the application for a mandamus the relator urges that the statute in question violates section 10 of article 1 of the Federal Constitution and is void because its effect is to impair the obligation of a contract existing at the time the statute was passed. The argument is that the obligation of the contract iself is impaired by depriv-ing the landlord of a remedy that has existed in this state since 1820, and that, too, the only really effective remedy, because ejectment is so expensive and dilatory that it has been said by our highest court that in many instances it amounted to a denial of justice (*Reich* v. *Cochran*, 201 N. Y., 450, 453). It may be observed that chapter 947, of the same group of statutes, suspends for the same period of two years the remedy of ejectment, except in the same cases where summary proceedings are allowed by chapter 942. It might be possible to dispose of this motion by drawing a distinction between the statutory remedy of summary proceedings and the common-law remedy of ejectment and to hold that the Legislature had power to take away the remedy it had once given and not to attempt to pass upon the fundamental question of the constitutionality of the act of the Legislature in taking away, for the time being and under the conditions specified, both remedies. Since the broad ground of con-

stitutionality has been exhaustively argued, however, in very learned and able briefs, I will decide the question upon that ground, as it is possible to decide it, because, in my view, the statutes in question are within the police power of the Legislature and valid. In discussing the question I shall consider, without any attempt at formal separation, both of the constitutional grounds of objection urged against the statute by the relator, the second ground being the claim that the legislation violates the Fourteenth Amendment of the Federal Constitution, which prohibits states from depriving persons of property without due process of law, and the similar provision contained in section 6 of article 1 of the Constitution of the State of New York. In a final analysis, impairing the obligation of a contract deprives the aggrieved individual of property, in the full sense of that word, just as truly as taking any other form of property does. At the outset, in the consideration of the constitutional question presented, it should be remembered that the meaning of the words police power and the meaning of the word property are not and cannot be fixed and unchanging. The two concepts are more or less in conflict, and as one is enlarged the other is sometimes correspondingly diminished. The one represents the right of the community to protect itself. The Roman maxim was *Salus populi suprema lex*. The other represents the right of the individual to dominion over such things as are permitted by the state to be the subjects of ownership. But the individual right of dominion extends only so far as the welfare of the community permits it to extend, or probably it would be more accurate to say so far as the preponderant public sentiment of the time deems that the welfare of the

community can safely permit it to extend. As John Stuart Mill expresses it, "The idea of property is not some one thing, identical throughout history and incapable of alteration, but is variable like all creations of the human mind; at any given time it is a brief expression denoting the rights over things conferred by the law or custom of some given society at that time; but neither on this point nor on any other has the law and custom of a given time and place a claim to be stereotyped forever" (31 Fortnightly Review, 513; Chapters on Socialism, p. 527). This latter idea was expressed by the United States Supreme Court as follows: "It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past, and cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize the public interest in a business and its regulation than government possesses to-day" (*German Alliance Ins. Co.* v. *Kansas*, 233 U. S., 389, 411). As industrial and economic and social conditions change, and indeed as public sentiment changes, the idea of property changes, and with it the correlated idea of police power changes. In general it may be said that as population becomes more dense and concentrated in very large cities, with the corresponding increase in complexity of organization made necessary to support so large a population in so small an area, the police power is enlarged and individual property rights, in many cases, have to be correspondingly diminished and curtailed in the public interest. It may not be without significance that the necessity for this new application of the police power has manifested itself, generally speak-

ing, in the largest centers of population not only in this country, but also in other countries deeply affected by the war. Whatever injuries an individual may suffer in the diminution of his property rights are, however, deemed to be made up to him by his sharing in the general benefits which the regulations secure to the community of which he is a member (*People ex rel. Necham-cus* v. *Warden*, 144 N. Y., 529, 535; *In re Wilshire*, 103 Fed. Rep., 620, 622). As might be expected, a distinct progress is to be observed in judicial decisions, and perhaps nowhere in a more marked degree than in the decisions of the Supreme Court of the United States, toward broader recognition of the police power. This is no more than to say that as modern life becomes more highly organized and the industrial and economic and social relations of individuals become more complex, so that each becomes more dependent on others and, in turn, each plays a part, however humble or however important, which has a relation to the convenience or comfort or necessity of others, the courts are recognizing these changing conditions and are keeping pace in their decisions and are allowing Legislatures to meet the new needs that arise with appropriate laws. It is noticeable in the carefully prepared and excellent briefs before me that the decisions cited in support of the property rights claimed by the relator are for the most part decisions of a generation ago, while the decisions relied upon to support the police power are those rendered in recent years. It was in *Noble State Bank* v. *Haskell* (219 U. S. 104, 111) that Mr. Justice Holmes said "the police power extends to all the great public needs" and that "it may be put forth in aid of what is * * * held by prevailing

morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." And it was in a still more recent case (*Atlantic Coast Line RR. v. Goldsboro*, 232 U. S., 548, 558) that the court said: "It is settled that neither the contract clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community * * * and that all contract and property rights are held subject to its fair exercise." In the present case I think it must be said that the legislative power was fairly exercised. That a "public emergency" existed there can be no reasonable doubt. The statute recites that such was the case, and the facts abundantly sustain the recital. But these laws are assailed as not being reasonably adapted to attain the end sought (*Matter of Jacobs*, 98 N. Y., 98; *Lawton v. Steele*, 152 U. S., 133). It is said that the evil to be cured is the scarcity of housing and that the building of more dwellings will not be promoted by depriving the owners of dwellings that now exist of the control of their property and curtailing their profits. It is true that the fundamental evil was the scarcity of dwelling space, but there was another more urgent evil, and that was the impending eviction of thousands of families. I recognize that there is abundant room for argument as to whether the means adopted by the Legislature were the best calculated to attain the end sought. But the selection of the means rests with the Legislature, not with the courts. As was said in *People v. Griswold* (213 N. Y., 92, 97): "Legislation passed in the exercise of the police power must be reasonable in the sense that it must be based

on reason as distinct from being wholly arbitrary or capricious, but when the Legislature has power to legislate on a subject the courts may only look into the enactment far enough to see whether it is in any view adapted to the end intended. If it is, the court must give it effect, however unwise they may regard it, or however much they might, if given the choice, prefer some other measure as more fit and appropriate." Judged by the foregoing test, the act under consideration quite clearly should not be annulled by the courts. It should, perhaps, be observed in this connection that provisions were made in some of the other bills passed at the same time designed to stimulate the building of dwellings. It may be well, also, to mention the fact that the landlord, taking this legislation in its entirety, is not deprived of income from his property; he is only prevented from collecting an unjust and unreasonable rent (chapter 944, Laws of 1920). Objection is also made that the enactments in question protected tenants in possession at the expense of other persons who were in search of places to live and who would have been eager to take the vacated dwellings. There is nothing to show that such persons were without any shelter at all, however, as apparently would have been the fate of thousands threatened with eviction, and, besides, as is shown in a portion of the principal brief submitted in support of the legislation, there is a principle well recognized in many widely separated parts of the world and at various periods of time that tenants in possession have rights superior to strangers who desire to obtain possession. I regret that the great length to which this opinion has grown forbids my making use of the interesting and pertinent historical data which has

been gathered with such erudition and presented in such an effective way. It must suffice to say that in different parts of the British Empire and in New York and Maryland there are precedents for giving preference to tenants in possession, and in many cases such precedents go to the extent of having the rent and conditions of occupancy determined by some tribunal created or selected for that purpose where the landlord and the tenant are unable to agree. My conclusion that the enactment in question is constitutional is supported by the decisions of a number of other judges in this state who have had the question before them either under the statutes of last April or the more recent September statutes. Among such decisions are *78th Street & Broadway Co.* v. *Rosenbaum* (111 Misc., 577), *Paterno Investing Corp'n* v. *Katz* (112 *id.*, 242), *Kuenzli* v. *Stone* (112 *id.*, 125), *People ex rel. Wasserman* v. *Fagan* (N. Y. Law Journal, October 18, 1920), *Hyman* v. *Gordon* (*id.*, October 28, 1920), *Guttag* v. *Shatzkin* (*id.*, October 20, 1920) and *Ulman Realty Co.* v. *Tamur* (*id.*, November 27, 1920). The opinion in the case last mentioned is extended and is rich in the citation of supporting authorities. My decision is that the statute in question is constitutional and valid and that the refusal of the respondent to issue the precept sought was right and that the application for a mandamus should be denied, with $50 costs. Settle order on notice.

Appellate Division of the Supreme Court.

SECOND DEPARTMENT.

December 7, 1920.

Present: JENKS, P. J.; MILLS, PUTNAM, BLACKMAR and KELLY, JJ.

PEOPLE ex rel. RAYLAND REALTY COMPANY,

Appellant,

v.

WILLIAM R. FAGAN, Clerk of the Municipal Court of the City of New York, Borough of Brooklyn, Sixth District,

Respondent.

Appeal by the relator from a final order of the Special Term, entered in the office of the Clerk of the County of Kings on October 19, 1920, denying the relator's motion for a peremptory writ of mandamus, directed to the defendant as Clerk of the Municipal Court of the City of New York, commanding him to issue to the relator a warrant to execute a final order in summary proceedings granted the relator by the Municipal Court to evict from the relator's premises a tenant who held over after the expiration of his term. The motion was denied at Special Term and the relator appeals to this court.

JENKS, P. J.—The relator acquired premises subject to a lease to Reines which expired on April 30, 1920. The relator instituted a summary proceeding in the Municipal Court against Reines as a holdover. The proceeding was heard on May 7, 1920, and a final order was made for possession, but staying the warrant to August 1, 1920. That order was amended on August 2 by stipulation extending the stay until October 1, 1920, on condition of no further stay. On October 4, 1920, the relator applied

to this defendant as clerk of the Municipal Court for a warrant in execution of the final order. But as chapter 942 of the Laws of 1920 had been passed on September 27, 1920, the clerk refused the warrant. The relator moved at Special Term for mandamus, and this appeal is from an order which denied that motion.

This appeal presents but two questions: (A) Was the summary proceeding pending at the time of the enactment of chapter 942 of the Laws of 1920? (B) And, if so, could the Legislature enact that statute which provides the stay, the basis of the clerk's refusal to issue the warrant?

(A) The said statute provides:

> "In a pending proceeding for the recovery of real property in such a city on the ground that the occupant holds over after the expiration of his term, a warrant shall not be issued," etc.

Thus the statute expressly declares the legislative purpose is to stay the warrant in a pending proceeding. A warrant can have no legal existence until after the final order. If the final order *ex propiore vigore* ended the proceeding, the proceeding could not be pending when the warrant, the very subject matter of the provision, came into existence. Further, the statute of summary proceeding declares that the issuing of the warrant for the removal of a tenant from demised premises "cancels the agreement for the use of the premises, if any, under which the person removed held them, and annuls accordingly the relation of landlord and tenant" (sec. 2253, Code of Civil Procedure). It follows that until the warrant issues the relation of landlord and tenant exists, and so the proceeding is not terminated by the final order. I think that

maugre the final order this proceeding should be regarded as "pending" within the purview of this statute (*Wegman* v. *Childs*, 41 N. Y., 159; *Pitt* v. *Davidson*, 37 N. Y., 235-241; *Mulstein Co.* v. *New York*, 213 N. Y. 308-314).

(B) The statute only postpones this statutory remedy in that it stays the issue of the warrant for two years. In no other way is the remedy touched. This is within the ordinary powers, so to speak, of the Legislature (*Stocking* v. *Hunt*, 3 Denio, 274; *Wolfkiel* v. *Mason*, 16 Abb. Pr., 221, Gen. Term, Com. Pls.; see, too, *Van Rensselaer* v. *Snyder*, 13 N. Y., 299; *Conkey* v. *Hart*, 14 N. Y., 22; *Morse* v. *Goold*, 11 N. Y., 281; *Butler* v. *Palmer*, 1 Hill, 324).

But the contention is that under the circumstance of this pending proceeding this provision is unconstitutional. The courts do not consider the constitutionality of a statute unless the question is so involved in the given case as to be essential to the determination of that case (*People ex rel. Wetmore* v. *Supervisors*, 3 Abb. Court of Appeals Decisions, 566; *Frees* v. *Ford*, 6 N. Y., 176; *Dodge* v. *Cornelius*, 168 N. Y., at 244; *Demorest* v. *Mayor*, 147 N. Y., 203-207; *White* v. *Scott*, 4 Barb., 56; *People ex rel. Yale* v. *Eckler*, 19 Hun, 607-614; *Simpson* v. *Wells*, 99 App. Div., 364-366; *People ex rel. Uson* v. *Waring*, 52 App. Div., 36-40; *Clark* v. *Kansas City*, 176 U. S., at 118). Then, and then only, the court decides whether there is conflict between laws of different authority, and the statute, being of lesser authority in so far as it conflicts with constitution, is declared extinct (Bryce, Am. Commonwealth, 253; Haines, Am. Doctrine of Jud. Supremacy, 184; Cooley, Cons. Lim., 227 et seq.).

The final order does determine every question litigated, or that may on the issues raised be litigated, relating to the existence and validity of the lease and the relation of the parties (*Reich* v. *Cochran*, 151 N. Y., at 127), but it does not, as we have seen, terminate the relation of landlord and tenant; that is done by the warrant, which is a subsequent step in the procedure itself (sec. 2253, Code of Civil Procedure).

It is not necessary to decide what, if any, were the contract rights of this owner perforce of the contract of leasing or of its performance, or of his institution of the summary proceeding which went to final order. At most the final order was but a judgment. But a judgment is not a contract (*McCoun* v. *N. Y. C. & H. R. RR.*, 50 N. Y., 176; *O'Brien* v. *Young*, 95 N. Y., 428; *Morley* v. *Lake Shore RR.*, 146 U. S., 162), and it is not within the purview of the constitutional provision as to the obligation of contracts (Black on Judgments, secs. 9, 10, 11). Whatever the contract rights of the relator or of its tenant they must give way to the public welfare. And a statute enacted in the exercise of the police power—the "law of overruling necessity," as it once was termed—is paramount and cannot be affected by previous contracts between individuals (*Manigault* v. *Springs*, 199 U. S., 473-481; *B. R. S. RR.* v. *B. S. RR.*, 111 N. Y., 132; *Lincoln Trust Co.* v. *Williams Bldg. Corp'n*, 229 N. Y., 313).

The contention against this statute assumes that the owner is deprived of all remedies. So far as this isolated statute is concerned, this is error. This statutory remedy is not abolished; it is but postponed and for a definite period. No attempt is made by this statute to affect any

other remedy. But we are pointed to other and contemporaneous statutes known as the September laws, and it is said that these statutes and this statute, all articulated, deprive the owner of all remedies for two years. As I have said, we cannot consider other statutes not necessary to the decision in this case with purpose to pass upon their constitutionality. But I concede that we could consider the September statutes, as any other statute, to determine whether all remedies were abolished, if in the case at bar we were thus confronted with that condition. But we are not confronted with that condition because, whatever other statutes may provide, the remedy affected only by this statute is not abolished, but is modified or postponed only, so far as the means of enforcement are concerned. It is not essential that the remedy extant should be as drastic or efficacious (*Sturges* v. *Crowninshield*, 4 Wheat., at 200, and see the comments of the chief justice as to the principle in *Bronson* v. *Kinzie*, 1 How., at 316).

If, however, contrary to the fact, by exercise of the police power all existing remedies were stayed by the Legislature by several statutes for a definite period determined by the Legislature, or if in the exercise of the police power all remedies were thus stayed in one statute for a definite period determined by the Legislature, even then the legislation would not necessarily transcend this sovereign power. The validity of the statute would depend upon its justification by emergency and the reasonableness of the stay under the circumstances.

Thus Cooley on Constitutional Limitations (7th ed., 414) says:

> "And a statute which authorizes stay of execution, *for an unreasonable or for indefinite period*, on judgments rendered on pre-existing contracts, is void, as postponing payment, and taking away all remedy during the continuance of the stay" (the italics mine).

Breitenbach v. *Bush* (44 Pa. St., 313) held a stay of all process for three years constitutional in that the emergency justified it. It was for definite time and it was not unreasonable under the circumstance (see, too, *Coxe's Executor* v. *Martin*, 44 Pa. St., 324). In *Bunn* v. *Gorgas* (41 Pa. St., 441) a stay was pronounced unconstitutional because the Legislature had not exercised its own discretion as to the duration of the stay. The line of discrimination is pointed out by Woodward, J., in *Bunn's case* (*supra*). The learned judge also pointed out that this feature—definite duration by the legislative act—saved the constitutionality of the stay for a year, upheld by the court, per Gibson, Ch. J., in *Chadwick* v. *Moore* (8 W. & S., 50). Both in *Breitenbach's case* (*supra*) and *Chadwick's case* (*supra*) the opinions deal with principles. Gibson, Ch. J., in the latter case considers the principle in the light of the decisions of the Supreme Court of the United States and concludes with the statement that summary suspensions of execution for a reasonable time have not been infrequent in some sister states, as creditors have submitted to them, as regulations depending, in the language of Justice Baldwin, "on the sound discretion of the Legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment." This language, as the context shows, is in *Jackson* v. *Lamphire* (3 Peters, 290),

see, too, *Edmundson* v. *Ferguson* (11 Mo., 344), *Bender* v. *Crawford* (33 Tex., 745). Black on Constitutional Prohibition (sec. 159) says:

> "There is reasonable ground for holding that when some public necessity exists, as in case of war or invasion, an act suspending legal proceedings for a limited period is not unconstitutional; for a statute of this character, prompted by such an emergency, rather conduces to the due administration of justice and is beneficial to parties litigant."

It is contended that the statute is unconstitutional because it takes private property without compensation. To say that it does "take it" is, of course, to beg the question. In *Transportation Co.* v. *Chicago* (99 U. S., at p. 642) the court, after declaration that private property shall not be taken for public use without just compensation being made, say:

> "But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, p. 542, and notes."

This statute does not touch the title of the owner. It does not physically take the premises. It does not directly work encroachment upon them. It does interfere to a degree for two years with the owner's absolute control. That is, if the present use of the premises is to be continued by the owner, the statute controls such use

by continuance of the present user; the owner cannot change the person of the user simply from preference of another, even though that other may be the more *persona grata* to the owner, or is ready to pay a greater sum for the use. Thus far, but no farther, the "consequence may impair its use," but this, as we have seen, as declared by the Supreme Court, is not the taking contemplated by the constitution.

It is contended that there is no principle that justifies the "taking of the property of A to give it to B for his private use," and that this is done by this law. But although the "immediate purpose" were the private use of B, the contention may not be sound if there is "ulterior public advantage." Thus in *Nolde State Bank* v. *Haskell* (219 U. S., 104) Holmes, J., for the court, in speaking of the exercise of the police power, says:

> "In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use" (*Clark* v. *Nash*, 198 U. S., 361; see, too, *Beekman* v. *Saratoga & Schenectady RR.*, 31 Pai., at 72).

The comparative significance of this "taking" is considered later.

The due process clause is not to be invoked as against exercise of the police power (*Union Dry Goods Co.* v. *Georgia P. S. Corp'n*, 248 U. S., 372).

The sweep of this sovereign power is broad and deep. In the *Slaughter House cases* (16 Wall., 62) Miller, J., says:

> "This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property. 'It extends,' says another eminent judge, 'to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the state * * * and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state. Of the perfect right of the Legislature to do this no question ever was or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.'"

The extent of the taking is measured by the emergency. Cooley on Constitutional Limitations (p. 878) says:

> "And there are other cases where it becomes necessary for the public authorities to interfere with the control of individuals of their property, and even to destroy it, where the owners themselves have fully observed all their duties to their fellows and to the state, but where, nevertheless, some controlling public necessity demands the interference or destruction. A strong instance of this description is where it becomes necessary to take, use or destroy the private property of individuals to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army or any other great public calamity."

The judiciary is not supreme. But with respect to the sovereign power of the Legislature there may arise in a given case a judicial question necessary to the decision of the rights of the litigants then before the court. "For many times the things deduced to judgment may be *meum*

et tuum when the reason and consequence thereof may trench to point of estate" (Bacon, Viscount St. Albans). But the power of the courts to sit in judgment upon the Legislature must be exercised with the utmost caution (*People* v. *Griswold*, 213 N. Y. 92). In this case, Miller, J., for the court says:

> "Legislation passed in the exercise of the police power must be reasonable in the sense that it must be based on reason as distinct from being wholly arbitrary or capricious, but when the Legislature has power to legislate on a subject, the courts may only look into its enactment far enough to see whether it is in any view adapted to the end intended. If it is, the court must give it effect, however unwise they may regard it, or however much they might, if given the choice, prefer some other measure as more fit and appropriate."

Our function is to recall the Legislature to the confines of the highest law which limits all branches of government. In the words of Holmes, J.: "We should be slow to use the *nolumus mutare* against the law-making power." Bacon has said of the judges: "Let them be lions but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereighty."

We are now asked to declare as extinct an act of sovereign power—an act passed in the avowed exercise of police power, which is said by my brother Putnam in *People ex rel. Doscher* v. *Sisson* (180 App. Div., 468, aff'd 222 N. Y., 387) to be the least limitable of the powers of government. And we are asked to do so upon inspection of the act in that it stays for two years a statutory remedy.

The motives of the Legislature are not our concern (*People* v. *Shepard*, 36 N. Y., 285). If a state of facts could exist which justified a change in the remedy, "we must presume it did exist, and that the law was passed on that account" (*Antoni* v. *Greenhow*, 107 U. S., at 775).

The Legislature has declared that this act is passed in "emergency," which is an apt term for "a sudden or unexpected occasion for action; exigency; pressing necessity" (Cent. Dict.). As we have seen, this very word "emergency" is used by Mr. Justice Baldwin, of the Supreme Court, in *Jackson* v. *Lamphire* (*supra*), with reference to stay laws. What is the emergency apparently in the view of the Legislature? We can read in the legislative report of its joint committee (*Caminetti* v. *United States*, 242 U. S., 470-490) that the bill will do away with the anxiety of the many people in New York who are now holding their premises under short stays, or have been served with notices to move on October 1. The report of the joint legislative committee of September 20, 1920, tells us that over 60,000 tenants had been notified to vacate, irrespective of the rental, and says:

> "The attempts of some landlords to obtain more rent by taking tenants to court month after month, and the granting of short stays from time to time, subject families to great anxiety. They know not when they may have to move, have no place to go, lose respect for laws and the courts, who to them seem unable to respect their rights. They readily fall victims to the agitator."

To recur to the language of Miller, J., in the *Slaughter House cases* (*supra*), this police power extends "to secure social order, life and health of the citizens, the comfort of an existence in a thickly populated community

—persons and property are restricted to all kinds of restraints and burdens to secure the general comfort, health and prosperity of the state." Can it be said that the Legislature, primarily the judge of reasonableness (*Adoni v. Greenhow, supra*), was unreasonable in that it has exercised this sovereign power so that we must conclude that the police power is but a cloak or a guise?

The Legislature is not dealing with an invasion of tramps. It is not yielding to a new variation of the cry of "bread and the circus." It would assure the present homes to citizens who pay for their habitation. Confronted with the stress of circumstances, could not the Legislature have asked what city, even our City of New York, however law abiding, can maintain its peace, health and order against the consequences of the evictions of perhaps thousands of its law-abiding citizens so that they may become outcasts with no places to lay their heads? What consequences, in this densest city ever known, may not follow when the life and health of these citizens and their families face the peril of homelessness? All landlords are not profiteers and many are humanitarians. They may be, there must be, isolated cases of hardship in all applications of the rule of the greatest good of the greatest number. The house of the owner may be destroyed to prevent the spread of fire. But what is the chief peril of conflagration but the destruction of shelter, whereupon civil government may totter, pestilence may come and anarchy stalk in? Concede that this statute does not "add one square foot" to the housing accommodations of the people in the City of New York; yet there remains the question of the preservation of

civil order and health and life. If we can, I think we may suppose that the Legislature believed that this statute of stay for such a period might make for the order and health and life of this community. Upon this view might it not be "comparatively insignificant" that as a necessity incident to meet the "emergency"—to keep tranquility—the owner who purported to continue the use of his land for tenants, should not change the tenant without reason save caprice or avidity for higher rentals. "New occasions make new duties." In this emergency I cannot see that the statute flouts the constitution or is collectivism beyond the spirit and the law of our land.

My decision, if not my discussion, is confined to the question necessarily presented for the determination of this case. I advise affirmance of the order, without costs.

Putnam, J., concurs.

Mills, J. (concurring)—I concur in the result of affirmance, but solely on the following grounds:

The new rent statutes are of three classes, viz, (a) those limiting the application of the remedy of summary proceedings; (b) those limiting the remedy of ejectment, and (c) those limiting the right to recover an agreed rental. The instant case deals only with the first class of provisions. As to those, I think that as the remedy of summary proceedings is purely statutory it was competent for the Legislature to take it away in whole or in part. The questioned statutes serve in that respect only to take the remedy away in a very substantial part. Therefore I conclude that these provisions are constitutional and valid, regardless of the motives which actuated the Legislature in their passage. As to each of the other two classes of provisions there are very grave questions

as to their constitutionality and validity which it would be our duty to consider most carefully if they were by this record presented for our determination; but I conclude that they are not so presented. Obviously they are not, unless the three classes of provisions are so interrelated as to constitute one entire scheme to the extent that one cannot be carried into effect without the others also being accomplished. Doubtless they constitute one entire scheme, but I think that the three measures thus adopted by the Legislature to effectuate its purpose are separate and distinct, so that we may fairly treat those three sets of provisions as independent, the one from the other, and so declare the one here involved valid without regard to the validity of the others. We have, in this country, great historic authority for the proposition that even the highest court, in considering a question of the very greatest popular concern, should confine itself to the single point directly presented by the record before it. For these reasons I vote to affirm.

Kelly, J. (concurring)—The Special Term refused the mandamus and the relator appeals, insisting (a) that the proceeding was not pending at the date of the passage of the act (chapter 942, Laws of 1920), and (b) that the act in question is unconstitutional and deprives relator of its property without due process of law. The Legislature called in extraordinary session by the governor has declared that an emergency exists affecting the life and health of the community at large, and has prohibited the issuance of warrants in pending summary proceedings until November, 1922. If the action of the Legislature is not wholly arbitrary or capricious and is based on reason, the courts may only look into its enactment far enough

to see whether it is in any view adapted to the end intended. "If it is, the court must give it effect, however unwise they may regard it, or however much they might, if given the choice, prefer some other measure as more fit and appropriate" (*People v. Griswold*, 213 N. Y., 92). In my opinion the act in question cannot be said to be wholly arbitrary or capricious nor can a court say that the Legislature had no reason for taking action of some sort to relieve existing conditions. The co-ordinate branches of the government have declared that the emergency exists and the courts cannot substitute their judgment as to the existence of the fact if they entertain different notions on the subject. The method adopted by the Legislature to relieve the situation is by exercise of the police power. I do not agree that the object or result of the act in question is to deprive the relator of its property, or that it is deprived of its property for the benefit of the tenant. The declared object of the act is to benefit the entire community; that it may incidentally prevent the ousting of this particular tenant from his apartment for a time is doubtless true, but the benefit intended is not to this tenant, but to the community of which he is part. The criticism that the act does not add a single dwelling or apartment, overlooks the broader purpose declared in the legislation to protect the public from the danger incident to wholesale evictions. I agree with the presiding justice that the summary proceeding in the case at bar was pending within the meaning of chapter 942, Laws of 1920, and for the reasons stated by him. In my opinion the manifest intention of the Legislature was to prohibit the issuance of warrants in every

proceeding in which they had not been issued at the date of the passage of the act.

The summary proceeding to remove tenants was a creation of the Legislature, and despite its long continuance on the statute books, altered and amended from time to time, I am of opinion that the Legislature might repeal it altogether, and so had power to regulate the procedure by staying the execution of warrants.

But it is said that if the act (chapter 942, Laws 1920) is a valid exercise of legislative power, the relator corporation is without remedy to recover possession of its property for two years, because it is barred from the common-law action in ejectment by another statute passed on the same day.

In passing upon the constitutionality of the laws enacted by the Legislature I am of opinion that the court must confine itself to the statute immediately presented for review. We are dealing with one act, chapter 942, Laws 1920. The relator is not before the court asserting its rights in an ejectment action; the right of the relator corporation to maintain an action in ejectment has not been questioned on the record before us, and that question may never be presented. Especially where the constitutionality of the action of the co-ordinate branch of government is involved the courts should not go outside the record to pass upon the constitutionality of other statutes which may or not affect the rights of the litigants, but which are not directly involved in the case at bar (*People ex rel. Doscher* v. *Sisson*, 222 N. Y., 387; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S., 531; *Jeffrey Mfg. Co.* v. *Blagg*, 234 *id.*, 571).

For these reasons I vote to affirm the order of the Special Term.

BLACKMAR, J. (dissenting)—Agreeing, as I do, that this case falls within the scope of chapter 942 of the Laws of 1920, prohibiting in effect the issuance of a warrant until November 1, 1922, in pending proceedings to dispossess tenants holding over after the expiration of their terms, there remains for determination only this question, viz: Has the relator been deprived thereby of its property without due process of law? This question, for convenience of discussion, may be divided into two parts: First, has the relator been deprived of its property? and second, if so, has it been by due process of law? A law passed in the exercise of the police power is due process of law, and the second question, therefore, resolves itself to the consideration of the police power as a justification for depriving the relator of its property.

Proceeding, therefore, in order, I will first consider whether the relator has been deprived of its property. The relator is the owner of real property in the City of New York. On the 7th of May, 1920, by a final order made by a court of competent jurisdiction, it was adjudged to be entitled to immediate possession. In such proceeding no further judicial act was to be performed. It was a final adjudication between the relator, as landlord, and its tenant, which established their respective rights and duties with reference to the possession of the premises. Thereafter was enacted chapter 942 of the Laws of 1920, which prohibited the issuance, until November 1, 1922, of the warrant to execute such final order. The actual, practical result is that the tenant is given the right to occupy the relator's property for upwards

of two years. For two years, or for such shorter time as the tenant may choose to occupy it, the relator is deprived of its property.

This is not like the cases cited by the presiding justice, in which there were stays of execution on judgments for money. In such cases the conditions of the parties were unchanged by the stay and interest compensated for delay. This law does much more. It operates on future conditions and practically carves out of the landlord's property an estate for years which it bestows on the tenant.

But it is said that the only effect of the law in question is to deprive the relator of a remedy given by statute. As an abstract proposition, I do not question the power of the Legislature to alter or abolish the remedy afforded by statutory summary proceedings. But we are not discussing abstract propositions and should confine ourselves to the case before us. The relator had, before the September laws were passed, obtained a final order adjudging to it the possession of its property. To enforce this right its sole remedy was the warrant, the issuance of which follows of course as a ministerial act. This remedy the statute took away. Undoubtedly, if there were other means of regaining possession, open in the law, it would not be deprived of its property, for it could secure the property by resort to such other means. But the final order conclusively adjudicated the question (*Reich* v. *Cochran*, 151 N. Y., 122). In the face of such adjudication no other action for the same relief can be maintained. If the relator should bring an action of ejectment, which concededly is the only other possible remedy, the final order could be pleaded as a bar. Two

judgments cannot be obtained on the same cause of action. The right is merged in the first judgment and cannot again be the basis of another action. It follows that as to the relator, which has obtained the final order, the statute deprives it for two years of all remedy for obtaining possession of its property (Black on Judgments, chap. 19, sec. 674; *Caglus* v. *New York, Kingston & Syracuse R. R.*, 76 N. Y., 609).

This argument does not need the support of chapter 947 of the Laws of 1920, which took away the remedy by ejectment also. As to that it is sufficient to say that chapters 942 and 947 were passed at the same extraordinary session of the Legislature, where by virtue of the constitution (art. 4, sec. 4) the Legislature was limited by the message of the governor to passing upon the subject of the housing situation. The laws so passed deprived by their express terms until November 1, 1922, all landlords within the territory specified which includes the City of New York, of the aid of the courts in obtaining possession of their property from holdover tenants. I cannot perceive how we are justified in assuming the unconstitutionality of chapter 947 in order to sustain chapter 942. But, as my associates claim that chapter 947 is not in any way before us, I rest my argument on the proposition first stated, that the cause of action to oust the tenant was merged in the final order and cannot be the basis of any other relief, and therefore the law which deprived the relator of the power and right of enforcing the final order for two years deprived it of its property for that length of time.

Assuming, then, that the relator has been deprived of its property, we reach the question whether it was by

due process of law, or, what is the same thing, in the proper exercise of the police power. The power to legislate in the interest of the public health, safety, morals and general welfare is essential to every government, and is called the police power. The constitutional guaranties of life, liberty and property were not meant to nullify this power nor to limit its just operation. Neither can the police power be exercised so as essentially to impair these guaranties. The police power and the constitution are like adjoining fields of law. There is a boundary between them which cannot be defined in advance, for it shifts with the necessities of the situation, but as each question arises it is the duty of the court to determine in which field it lies. The constitutional provision against depriving any person of his property without due process of law applies as well to legislative as to judicial acts; in fact it limits the power of every department of the government, whether executive, legislative or judicial. As was said by Judge Andrews in *Berthelf v. O'Reilly* (74 N. Y., 509, 519):

> "In judicial proceedings due process of law requires notice, hearing and judgment; in legislative proceedings conformity to the settled maxims of free governments, observance of constitutional restraints and requirements, and an omission to exercise powers appertaining to the judicial or executive departments."

It is the duty of the courts, who are sworn to support the constitution, to decide, with reference to the special facts before them, whether the constitutional safeguards have been impaired by legislation under the guise of the police power, and there is no question which has occasioned so many well-considered judgments of courts of last resort or so much discussion among jurists.

Any law which limits the rights of an owner to use his own property, *pro tanto* deprives him of the property. Nevertheless there is no doubt that the Legislature may, in the exercise of the police power, regulate and limit the use of land to the injury of the owner. This is exemplified in our building laws, our health laws, our factory laws, our tenement-house laws, and in our so-called zoning law (*Health Department* v. *Rector*, 145 N. Y., 32; *Hadacheck* v. *Los Angeles*, 239 U. S., 394; *Welch* v. *Swasey*, 214 U. S., 91; *St. Louis Poster Adv. Co.* v. *St. Louis*, 249 U. S., 269; *Lincoln Trust Co.* v. *Williams Bldg. Corp'n*, 229 N. Y., 313). It is manifest that in all of these cases the owners have been deprived of some use of their real property by the exercise of the police power of the state. The application of this power varies with changing social and economic conditions. But it is always a question for the courts whether, in the exercise of such police power, the Legislature had infringed constitutional property rights. The province and duty of the courts cannot, it seems to me, be better expressed than in the words of Judge Peckham in *Welch* v. *Swasey* (214 U. S., at p. 105):

> "The statutes have been passed under the exercise of so-called police power, and they must have some fair tendency to accomplish or aid in the accomplishment of some purpose for which the Legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These principles have been so frequently decided as not to require the citation of many authorities. If the means employed, pursuant to the statute, have no real, substantial relation to a public object which government can accomplish; if the statutes are arbitrary and unreasonable and beyond the necessities of the case, the courts will declare their invalidity."

It is by this rule that the question whether the constitutional rights of the relator to its property have been impaired by the operation of the law above cited must be decided.

We are bound by the judgment of the Legislature to recognize that in the district affected by these laws a condition exists which calls for legislation to correct it. The construction of new dwelling-house accommodations has been interrupted by the war. The population has steadily increased and is being continually reinforced by immigrants. The relation of the supply of housing accommodations to the demand has been interrupted, to the serious injury of the public. One subject for relief is this shortage of dwellings, and there can be no doubt that the Legislature may enact apt laws to correct this situation. In fact some of the twelve laws passed at the extraordinary session seem to have direct relation to this subject and are calculated to re-establish the proper relation between the supply and demand of housing accommodations. Such, for instance, are chapters 946 and 949, which authorize the investment of certain public funds in bonds of the Loan Bank of the State of New York, and which empower the city authorities to exempt from taxation for a limited time and for local purposes all buildings of a certain character to be constructed for dwelling purposes within a time specified.

But it is not perceived how the operation of chapter 942, under which the relator claims that it has been deprived of its property, will add one square foot to the supply of dwelling accommodations, or will decrease in any respect whatever the demand therefor. If the purpose and object of the Legislature is solely to relieve the

housing situation, this act, applying the test quoted from Judge Peckham, has no real, substantial relation to this public object. Six of the laws passed at the extraordinary session, including chapter 942, affect the rentals of property only, and an increase or decrease of rentals has no necessary and proper relation to the question of the sufficiency of the housing accommodations. It is not permissible to say that a landlord will dispossess his hold-over tenants for the purpose of holding the property vacant. His purpose is to increase the rent to the incoming tenant. While the price of building material, the cost of labor, the amount of taxes and the expense of maintenance are increasing, the tendency of these laws is to prevent that increase from finding its expression in the increase of the rental value of property. I therefore conclude that this law has no reasonable tendency to correct the condition of housing shortage.

But the problem is not yet solved. It cannot be said that the sole purpose of the laws was to increase the housing accommodations. One manifest purpose was to regulate the amount of rentals. I am not prepared to say that the regulation of rentals in a city like New York, where it is a condition of life that several million people shall have access to the limited amount of land included within the city limits, is beyond the police power of the state. I am not aware of any case that has gone so far, and that question may well be decided when it arises. But such regulation must be uniform and proceed upon principles of justice to all. The police power over the property of individuals is usually exercised by regulation and not by confiscation. I am aware of the danger of general statements, and for that reason I used the word

"usually." The exercise of the police power sometimes does result in confiscation; but the confiscation, so far as I am aware, always takes the form of the destruction of the property. Instances of this are the destruction of gambling instruments, of infected property, even animals, and the power, which is recognized to exist, of stopping a conflagration by the destruction of private property. But I am not aware that property has ever been "confiscated" for public use without just compensation, nor for private use under any circumstance whatever. In fact, to take one man's property and vest it in another is not an act in "conformity to the settled maxims of free governments."

We have seen that the operation of chapter 942 of the Laws of 1920 was to deprive the relator of the right of possession of its property for a period of upwards of two years for the use of the tenant. As the essential element of the ownership of real property is the right of possession the relator is deprived of its property. There is no pretense that its land was taken for a public use nor that just compensation was made in the manner required by the constitution. For two years its land is taken and the use of it given to another. I had supposed that it was established beyond question that under our constitution the property of one man could not be taken by legislative act and vested in another (*Powers* v. *Bergen*, 6 N. Y., 358; *Brevoort* v. *Grace*, 53 N. Y., 245; *Gilman* v. *Tucker*, 128 N. Y., 190; *Traction Company* v. *Mining Company*, 196 U. S., 239; *Matter of Lansing*, 182 N. Y., 238). The claim of the respondent is, it seems to me, resolved to this: That if this be done in a sufficiently large number of cases it will result in advancing the

public weal. A like argument could be used with equal force in favor of an equal division of property or an expropriation of property in land for the purpose of establishing communism. I take it that it is not competent for the Legislature, even in the interest of public welfare, to take private property and devote it to a private use. Here at least is a boundary to the police power. The radical difference between statutes regulating and limiting the use of private property, even to the injury of the owner, in the interest of the general welfare, and those whose effect is to transfer the use of property from one private individual to another, is obvious. As is said in the case cited by the presiding justice, the incidental effect of a law in the interest of public welfare may be to permit a "comparatively insignificant taking of private property for what in its immediate purpose is a private use." But is this a "comparatively insignificant taking"? The relator landlord cannot obtain possession of its property for two years, although judicially declared entitled to it. Meanwhile, under drastic penalties (chap. 951, Laws of 1920), the landlord must properly maintain the premises, pay taxes, and eviction for non-payment of rent cannot be had if the rent is increased without the consent of the tenant (chap. 945, Laws of 1920). Nor can the landlord recover rent reserved except subject to a new and strange defense of duress, and subject to a presumption that the rent is unreasonable if increased during the preceding year (chap. 944, Laws of 1920), and finally, the landlord is deprived of power to fix the rent, except subject to the revision of some court. It seems to me that it would be a misuse of language to call this a "comparatively insignificant taking of private prop-

erty." It is in my view a substantial taking of private property for private use. This is not due process of law, and consequently is not a valid exercise of the police power.

During the war we became used to an immense extension of the police power, under the name of war powers. This has also in a measure been continued during a period of peace. That public opinion which pervades the minds of all, including legislatures and judges, and upon which the maintenance of constitutional guaranties depends, has become so used to an abnormal exercise of the police power that the stability of the constitutional immunities is shaken. There is a danger that the continually recurring attacks on the rights of personal liberty and individual property, under laws passed in the exercise of the police power, may gradually undermine the stability of a constitutional form of government based upon the individual rights of a free people. A police power which has no constitutional limitations has no place in a free government. A literal application of much that has been written on the subject of the police power would leave the individual without protection from the arbitrary and tyrannous acts of a temporary majority.

I vote to reverse and to grant the motion for a mandamus.

District Court of the United States

SOUTHERN DISTRICT OF NEW YORK.

Before HOUGH, C. J.; MAYER and AUGUSTUS N. HAND, D. JJ.; holding the Court pursuant to Sec. 266, Judicial Code.

MARCUS BROWN HOLDING COMPANY,
Plaintiff,

vs.

MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ, and EDWARD SWANN, as District Attorney of the County of New York in the State of New York.
Defendants.

Hearing under order to show cause dated 18th November, 1920, requiring the defendant Swann as District Attorney to show cause why he should not be restrained *pendente lite* from instituting proceedings or actions of any kind against the plaintiff, its agents, etc., for failure or refusal to furnish heat, water, elevator service, etc., to the other defendants; also requiring the other defendants to show why they should not be restrained from "entering upon or continuing to occupy" the dwelling apartment described in the bill of complaint herein, or make use of any property belonging to plaintiff without plaintiff's consent.

Plaintiff is a corporation of New Jersey; defendants, citizens of New York and residents of this District.

About 30th September, 1920, plaintiff became owner in fee of a large apartment house in this City, worth (as alleged) upwards of a million dollars.

When plaintiff acquired this building, defendants other than the District Attorney were tenants therein

holding an apartment under a written lease made by plaintiff's predecessor in title on October 1, 1917, and terminating September 30, 1920; which lease contains the usual mutual covenants for quiet enjoyment and peaceable surrender. This plaintiff-landlord and its predecessors in title are in legal effect one legal entity.

In March, 1920, the landlord notified the tenant-defendants to surrender possession of the apartment in question at the expiration of their lease; in point of fact the landlord, before giving notice, executed a new lease, taking effect at the expiration of defendants' tenancy, to other parties, presumably more satisfactory to the lessor.

In June, 1920, the tenant-defendants advised the landlord that they were

> "willing to renew the lease of apartment in your premises at a reasonable increase to be determined by the Mayor's Committee."

This was rejected, the landlord writing that it expected the tenants to "surrender the premises on the expiration of lease as therein provided." At expiry the tenant-defendants refused to move; and having answered herein we assume the truth of their pleading alleging that they now are in occupancy of the apartment aforesaid under the protection of certain statutes of the State of New York, and

> "are and at all times have been ready, able and willing to pay the fair and reasonable increase as the same may be determined by a Court of competent jurisdiction."

Plaintiff insisting upon its right to choose its own tenants, brings this suit alleging the unconstitutionality of

the statutes under which defendants justify retention of said apartment; which statutes are (as appears by the tenant-defendants' answer) Chapters 942 and 947 of the Laws of New York for 1920.

Plaintiff alleges as further violating its rights in the premises other statutes of New York, being Chapters 943-946 inclusive, and Chapters 948-952 inclusive, and Chapters 131, 132 and 135-138 inclusive of the laws of 1920.

Defendant Swann as District Attorney is sued because by Chapter 131 as amended by Chapter 951 there is added to the Penal Law of the State the declaration that any lessor, agent, janitor (or the like) of any building wherein lessees are, expressly or impliedly, entitled to hot or cold water, heat, light, power, elevator service, telephone or any other service or facility, who wilfully or intentionally fails to furnish the same, or who so "interferes with the quiet enjoyment of the leased premises by such occupant," is guilty of a misdemeanor.

The prayer as to the tenant-defendants is that they be

> "enjoined and restrained from entering upon or continuing to occupy the apartment herein described or to make use of any of the property belonging to this complainant without this complainant's consent."

As to the District Attorney, the prayer is that he be enjoined from instituting any proceeding or action under the statute above alluded to or otherwise, for any failure or refusal on the part of the plaintiff to furnish the facilities above referred to to the tenant-defendants or "any other person occupying any part of the building" (belonging to plaintiff) without "its consent or permis-

sion, and holding over against its will after October 1, 1920, under color of the statutes and laws" above referred to.

Hearing is on the bill, the answer of the tenant-defendants, the affidavit verified 17th November, 1920, of Mr. Joseph A. Seidman, attorney for plaintiff, the affidavit verified 3d December, 1920, of Mr. Samuel R. Gerstein, attorney for tenant-defendants, and certain public documents, viz.: "Reports of the Joint Legislative Committee on Housing," transmitted to the Legislature of New York on September 20, 1920, and the Message (bearing the same date) of Governor Alfred E. Smith, relative to "Housing Facilities within the State, and Recommending Legislation in Reference Thereto."

It thus appears as a fact satisfactorily proven that the statutes above enumerated from Chapters 942-952 inclusive (commonly and collectively known as the September Housing Laws) were made laws for the reason and in response to the demand or emergency insistently presented to the Legislature by the above mentioned report of its own Joint Committee and by the Governor's Message.

The other statutes complained of by plaintiff are collectively known as the "April Housing Laws." Assuming legislative power to enact all these laws, the April statutes have been almost wholly superseded by those of September. The importance of the earlier statutes, so far as this bill is concerned, seems to be that should the September acts be voided, argument might be made that the April acts were revived; hence complaint is made of all the housing legislation of 1920.

Hotchkiss, C. J.—Several objections to plaintiff's right to be heard have been insisted on, and must be first considered.

The bill (it is said) sets forth several matters of a distinct and independent nature against several defendants, and is therefore multifarious. In our opinion this is true, but it is also true that the 26th Supreme Court Rule in Equity has rendered that defense unavailable, whenever in the opinion of the Court "sufficient grounds appear for uniting the causes of action in order to permit the convenient administration of justice." The rule has been thus interpreted in this District since its promulgation; and see *Crawford* v. *Washington, etc., Co.*, 233 Fed. at 966; *Eclipse Co.* v. *Harley*, 244 Fed. 463; *United States* v. *New England, etc., Exchange*, 258 Fed. 732.

The separate matters in this bill are two—one a complete severable cause of action against the District Attorney, the other (equally complete) against the tenant-defendants; yet plainly the constitutionality or the reverse of any action by the District Attorney depends wholly upon the constitutionality of these housing statutes. The rights of occupiers against landlords will, as to the services referred to in Chap. 951, depend upon the constitutionality of the statutes permitting them to remain where they are not wanted. Consequently the connection beween the rights of the tenant-defendants and those of the District Attorney is so intimate that both rights grow out of the same mass of legislation, and they should be tested together. This case affords a good example of the wisdom of abrogating the strict rule regarding multifarious pleading.

It is further said that the bill as affecting the tenant-defendants, is no more than an endeavor to bring an ejectment suit in equity. Such efforts have often been made and always failed (*Smyth* v. *New Orleans, etc., Co.*, 141 U. S. 656), and this bill suggests no circumstances under which this court of equity would be empowered to issue mandatory injunctions which would be the equivalents of writs of possession—yet this is the futile prayer of the bill.

But under modern procedure the dismissal of the bill does not necessarily follow. On the contrary, the Court is required by Act of March 3, 1915 (38 Stat. 956), to transfer any action wrongly brought in Equity to the law side, and grant a repleader.

This plaintiff might, however, have brought an action for the recovery of possession of real property (ejectment) at law and in this Court. No state statute can define or limit the jurisdiction of this Court; and this is true, although it be assumed that the defenses in ejectment authorized by the statutes enumerated would be as available to defendants in the United States Courts sitting in New York, as they are in the tribunals of the state.

It is next objected that the bill cannot stand as against the District Attorney; because the question must be raised after indictment, and in the criminal court. Considering the actual sequence of events in *Ex parte Young*, 209 U. S. 123; *Raich* v. *Truax*, 239 U. S. 33; *Wilson* v. *New*, 243 U. S. 332, and *Hammer* v. *Dagenhart*, 247 U. S. 251, courts of first instance may well refrain from much legal exposition.

It is true that the reasons assigned in some of these cases, for going into Equity, were in substance that the party complaining would be injured in some constitutional right, by the operation of a statute alleged to be unconstitutional without ever being proceeded against himself; while in this instance plaintiff is personally subject to the operation of Chap. 951.

But the public documents above mentioned prove that the object of Chapter 951 is not to extend criminal liability to owners of apartment houses, for that was done in April by Chapter 131. The purpose is to make criminally liable substantially all of the landlord's servants or agents concerned in the operation of an apartment house; and the reason for this is that it had been found practically impossible to prove guilty knowledge on the landlord's part, wherefore conviction was impossible.

We do not understand that the Supreme Court has, in proceedings like this, barred from Equity *all* persons who may be pursued under a criminal statute, but only those who have under the statute a fair opportunity of raising the constitutional question in criminal proceedings brought directly against them. But in the cases which the legislature expected to produce by Chapter 951 this defendant would have no standing; yet if its agents are convicted, such conviction may obviously produce civil suits against and resultant liability on the part of this plaintiff.

Without attempting to define the limitations of bills in equity against officials charged with the administration of the criminal law, we think this suit is within the practice of the cases cited.

We therefore have before us two causes of action severally cognizable in this Court, though not in the same litigation; this is not because the bill is multifarious, but because one cause of action is legal and the other equitable. We may shortly note here that the jurisdictional amount is well pleaded, which is enough for present purposes.

It is, however, plain that if the statutes affecting the rights of the plaintiff and the tenant-defendants are constitutional, plaintiff can no more succeed in an action of ejectment at law than it can under this bill in equity; and it is equally clear that if such statutes are constitutional the bill against the District Attorney should be dismissed. It is, therefore, an idle ceremony to separate the causes of action and send one to the law side of the Court, and we shall now consider whether in any form of procedure, on either side of the Court or against any defendant, plaintiff has revealed a cause of action.

Disregarding Chap. 948, which affects Buffalo and Rochester only, and speaking generally of the other September laws, the legislative intent is this: Within what may be called the Metropolitan district (New York City and contiguous counties) the owners of dwellings including apartment and tenement houses (but excepting buildings under construction in September last, lodging houses for transients and the larger hotels) are wholly deprived until November 1, 1922, of all legal methods of removing from their premises the tenants or occupants of September, 1920, provided that such tenants or occupants are (in effect) ready, able and willing to pay a reasonable rent or price for their use and occupation.

Whenever (the commonest case in this City) the tenancy was from month to month, any demanded rent greater than that of a year prior to such demand is presumptively unreasonable and oppressive. Whether the landlord attempts to recover the desired rent by personal action, or tries to get back his premises by dispossess proceedings or ejectment, a September occupant can always block him and remain in possession by bringing into Court a sum equivalent to the last month's rent, until the issue of reasonableness is passed on by Court and jury. The landlord's former legal rights are intact, however, when the occupant is "objectionable", when the demanding landlord is a "corporation formed under a cooperative ownership plan", and when the building is in good faith required for the purpose of demolition and rebuilding or the personal occupancy of the owner.

A knowledge of pre-existing law and the words of the statutes are enough to prove that the legislative desire is to maintain for about two years the September status of the kind of dwellings in which (by common knowledge) lives the major portion of the population of the Metropolitan district. This status is to be maintained against the landlord's will if necessary but at the option of the tenants; for the landlord cannot select his tenants, but must accept what may be called the statutory tenants; yet every such tenant is and will be as free to depart and choose another landlord as he was before September, 1920.

Finally, to prevent owners from rendering their apartments uncomfortable for, if not uninhabitable by, the unwelcome statutory occupants, any intentional diminu-

tion or denial of the ordinary facilities or conveniences of apartment house life is made a misdemeanor on the part not only of the owner but substantially of every person connected with the management of the building, if intentional failure to furnish such facilities can be proven against him.

Speaking now specifically of the facts in the present case, the tenant-defendants herein, by law older than the State of New York, became at the landlord's option trespassers on October 1, 1920. Plaintiff had then found and made a contract with a tenant it liked better, and had done so before these statutes were enacted. By them plaintiff is, after defendants elected to remain in possession, forbidden to carry out his bargain with the tenant he chose, the obligation of the covenant for peaceable surrender by defendants is impaired, and for the next two years Feldman, *et al.*, may, if they like, remain in plaintiff's apartment, provided they make good month by month the allegation of their answer, *i. e.*, pay what "a Court of competent jurisdiction" regards as fair and reasonable compensation for such enforced use and occupancy; and meanwhile, if any person concerned in the management of the apartment house intentionally cuts off any of the facilities or conveniences appurtenant to apartment house life when Feldman and Schwartz were presumptively desired as tenants—a crime has been committed.

Since jurisdiction depends on diversity of citizenship, plaintiff is entitled to urge violations of the state as well as the federal constitution, but this Court will confine itself to the latter charter of rights; the construction of

the state constitution having been exhaustively considered by the courts of the state in contemporaneous and similar litigation.

It is asserted that by these statutes the obligations of plaintiff's contracts have been impaired, and so have those of a great number of other landlords. This is plainly true—the interpretation of Sec. 10 of Art. 1 of the Constitution made in *Green* v. *Biddle*, 8 Wh. 1, has never been departed from.

Further assertion is that plaintiff and other landlords similarly situated have been denied the equal protection of the laws, in that the owners of finished, and presumably occupied dwellings have been chosen for legislative oppression, when no such burdens have been laid on owners of dwellings as yet unfinished or hereafter to be erected, nor upon those possessed of office and business property, hotels and the like—who use their real estate for purposes of profit in the same manner and to the same extent as do the dwelling-house landlords.

It has been often said that the equal protection of the laws mentioned in the Fourteenth Amendment means a pledge of the protection of equal laws, and more specifically that every state shall give equal protection and security to all under like circumstances, to the end that no greater burdens shall be laid upon one than are laid upon others in the same calling and condition (*Barbier* v. *Connolly*, 113 U. S. 27). But it is also fundamental that such equality is not as matter of law inconsistent with classification both for benefits and burdens, and exactly how that classification may be made, has never been defined and we think never ought to be, having regard

to the infinitely changing circumstances of human society. When by classification or otherwise we arrive at "a partial or private law which directly proposes to destroy or affect individual rights", it is "unconstitutional and void", for "were it otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law, by another" (*Cotting* v. *Kansas City, etc., Co.*, 183 U. S. at 105). While a forbidden result may be thus denounced, well founded uncertainty as to means has produced the ruling that "what may be regarded as a denial of the equal protection of the laws is a question not easily determined. * * * no rule can be formulated that will cover every case" and the highest court has gone no further in the way of definition than to say that no class of persons shall be denied the same protection enjoyed by "other classes in the same place, and *in like circumstances*" (*Connolly* v. *Union, etc., Co.*, 184 U. S. at 558). The phrase "in like circumstances" leaves open a question newly presented in each new case.

Again it is said that these statutes put an end to liberty of contract and take property for a private use, and therefore in both respects amount to a denial of due process of law. That as to one, and a very large fraction of the contractual engagements current in this city, there is no liberty of contract under these statutes cannot be denied; and that property is taken from the landlord for the use of the statutory tenant is also true, in the sense that the property owner may be, and is in this instance compelled to let his property be enjoyed by one whom he does not want; and it may be true in

another sense although the statutory-tenant be a person entirely satisfactory except in the amount of rent he pays—if there be any legal difference between what the landlord could get in the open market for his property and that reasonable rent for the fixing and recovery of which the state still affords legal machinery.

But when appeal is made to the due process clause of the Fourteenth Amendment, it must always be remembered that so far as the national Constitution is concerned the phrase has never been authoritatively and finally delimited or defined—definition has been declined, because it is better to ascertain meaning in each case by a process of judicial inclusion and exclusion (*Davidson* v. *New Orleans*, 96 U. S. at 104).

It is a wearisome truism that any legislative act is presumptively constitutional; it is also true that in popular, if not in professional estimation the presumption weakens in proportion to the novelty or singularity of the statute. No legislation really like that at bar has been discovered in American history by the research of counsel, and the nearest (and not very near) instances known to us are the stay and collection laws of many states (notably Kentucky) in the early days of the last century, and the limitations upon the private use of real property considered in *Welch* v. *Swasey*, 214 U. S. 91.

But no matter how astonishing the legislation appears to the citizen, it has been so many times said that the wisdom, expediency or sincerity of the legislature is not open to judicial inquiry, that citation is superfluous. Judicial review is, and always has been, properly limited to an inquiry into the *reason* for the ascertained legisla-

ive intention—starting with the premise that the mere "say so" of the legislature does not furnish a reason by mere existence.

This inquiry has led courts very far, and it is doubtless true that reasons have of late years been judicially considered concerning which previous generations were not asked to inquire, and would have perhaps deemed the inquiry superfluous, if not improper. How wide this investigation has become, and how rapidly its scope has enlarged, can be seen by comparing not only the decisions but especially the briefs and records in *Lochner* v. *New York*, 198 U. S. 45, with those in *Muller* v. *Oregon*, 208 U. S. 412.

The reason for the laws here involved is patent from the public documents above mentioned; no appeal need be made to common knowledge or contemporary observation.

In October last the Municipal Courts of New York City were flooded with more "Notices to quit", *i. e.*, summary dispossess proceedings, than had ever before been known during an entire year. They amounted to an hundred thousand, and according to the estimate of families commonly used by local relief associations and other statisticians, the number of persons involved in each dispossess proceeding was not less than four, and in all probability five. This meant that nearly ten per cent. of the permanent population of the city would (if existing laws took their course) shortly be seeking other habitations on the eve of winter.

The demands of a world at war had for several years produced such application of men, money and material

to other and more immediately lucrative occupations, that new dwellings in the City of New York and adjacent territory were conspicuously absent, while the same attractions that had practically stopped building, had increased the home-seeking population of the city to an extent unstated but certainly large.

This almost total absence of new homes produced a demand for the old out of proportion to the supply; such demand raised the market value of the old, and correspondingly diminished economic equality, or equality in bargaining between any actual landlord and any would-be tenant, either new or old. Such conditions produced a reason, deemed sufficient by the legislature, to prefer in the struggle for living space the tenants in possession to all others, and to them was given the option of remaining at a reasonable rent, so-called; really a statutory charge for use and occupation; but there was secured to the landlord a legal machinery for ascertaining such reasonable compensation.

As matter of law we cannot hold that the market value, or price, *i. e.*, what is fetched when goods are bought and sold in the *ordinary* course of trade—*Muser v. Magone*, 155 U. S. 240—is for the use of real property anything different from that reasonable rent or use-charge secured to the landlord by these statutes. We have nothing before us but the statute—no accusation is made that those charged with adjusting rent are rendering the acts unconstitutional by their practical interpretation of their duties thereunder. We therefore drop from further consideration the second part of plaintiff's argument regarding the taking of his property for private

use. This does not, however, affect the asserted constitutional right to "choose his own tenant."

Thus we think is reached the only inquiry open to Court: is the reason assignable for the housing laws constitutionally sufficient to overcome the constitutional objections presented?

It cannot be too often said that a constitution is not a code, nor a statute; and that it declares only fundamental principles and is not "to be interpreted with the strictness of a private contract" (*Legal Tender Cases*, 110 U. S. 421). To this doctrine we owe the rulings that even the contract clause of the Constitution does not override the power of the state to establish regulations *reasonably necessary* to secure the health, comfort or general welfare of the community—that is, to exercise the police power of the state (*Atlantic, etc. v. Goldsboro*, 232 U. S. 548); that in like manner "reasonable restraints" may be placed upon freedom of contract (*Rail & River Co. v. Ohio, etc., Commission*, 236 U. S. 338); and that a legislature may make police regulations although they interfere with the full enjoyment of private property and no compensation be given (*Chicago, etc., Co. v. Drainage Commission*, 200 U. S. 561).

Such decisions (and we cite but few of many) reduce the question to this—are these statutes an exercise of police power reasonably suitable for combatting or lessening the evil proved—and therefore constitutional, although at other times and under other circumstances they might plainly be obnoxious to fundamental principles of constitutional government?

In briefs something is said to the effect that the statutes are justified because consonant with the state's "public policy." The assertion gets nowhere—for it is firmly established that no state can have a public policy except what is to be found in its constitution and its laws constitutionally enacted (*People* v. *Hawkins*, 157 N. Y. at 12). This case stands or falls on police power.

Definition of this phrase has never advanced over Chief Justice Taney's declaration that it is no more than the power inherent in a sovereign (*License Cases*, 5 How. at 583). Applied to a state, this means its reserved sovereignty, inherent and incapable of being bartered away because necessary for the state's existence; and lessened only by what the people of the state joined with all the other people of the other states, in conveying to and consolidating in the United States.

On reason then, if a given subject matter is appropriate to the exercise of sovereign action, and such action has not been expressly and absolutely prohibited by the Federal Constitution as authoritatively construed, the legislative result is not forbidden, where the purpose is within the range of reserved sovereignty, the means appropriate, and the reason sufficient; even though in reaching the result some toes be trodden on; and how many toes, and how severely they may be trampled, is a question that varies with circumstances.

We may inquire therefore whether the subject matter of these statutes is historically appropriate for legislative regulation. While rarely if ever exercised in America, there can be no doubt that one of the oldest exercises of sovereignty has been to fix the price and use of some

of the necessities of life, especially bread. Shelter is as much a necessity as bread, and that likewise has in times of stress been the subject of regulation, and indeed of apportionment (Freund on Police Power, Sec. 308).

There have been, however, since the dawn of our legal history, some occupations closely allied with the necessities of life, which have always been governmentally regulated, both as to prices chargeable and persons to be served. The usual examples are inn-keepers, carriers, millers, ferrymen and wharfingers. At common law the property of these men was held to be devoted to a public use, and their occupations were public businesses (*State* v. *Edwards*, 86 Me. 102).

From this ancient doctrine grew the famous series of "elevator cases"—*Munn* v. *Illinois*, 104 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *North Dakota*, 153 U. S. 391. In and by these decisions, the doctrine of *property devoted* to a public use, became the doctrine of property *affected* with a public use, even when (as in the North Dakota case) the elevator owner really wished to and actually did confine his storage facilities to grain he had himself bought and desired himself to sell again. (Cf. dissenting opinion of Brewer, J.)

The step from *property affected* with a public *use* to a "business affected by a public interest" (*i. e.*, fire insurance) was taken in *German Alliance, etc., Co.* v. *Kansas*, 233 U. S. 389; and it must be now accepted on that authority as an "underlying principle that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation."

Since this pronouncement, and its legitimate and logical sequel, the "trading-stamp" case (*Rast* v. *Van Deman*, 240 U. S. 342), it may be and has been asserted that any business is affected with a public interest as soon as the electorate become sufficiently interested in it, to pass a regulatory statute. It is not necessary to go so far, but we must and do hold that the business of renting out living space, is quite as suitable for statutory regulation, and as much affected with a public interest, as fire insurance and trading stamps.

It is easy to multiply quotations as to the inviolability of private business. It is singular how uniformly they come from decisions holding some business open to intimate regulation, while saying that if such business were only private, it could not be regulated; but never is "private business" defined; it is another of those phrases which is left to a process of "inclusion and exclusion," which really means a finding of facts. Thus when *Budd* v. *New York* passed through the Court of Appeals in this state (117 N. Y. 1), Judge Andrews declared "that no general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services or interfere with freedom of contract, we cannot doubt." Similarly and very lately it was said in *Producers, etc., Co.* v. *Railroad Commission*, 251 U. S. 228, "It is of course true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, that is, to carrying for the public, the state could not by mere legislative fiat * * * convert it into a public

utility and make its owner a common carrier." That applicant had done just what the present plaintiff wants to do, selected its own customers, but it was regulated into taking customers it did not want, and so was Mr. Budd's elevator.

If, therefore, the allotment of necessaries in times of stress is a governmental function known to historic law, and the business now affected is (in such circumstances) one capable of being affected with a public interest, nothing remains of plaintiff's contention except the complaint of inequality in legal protection, *i. e.*, of classification.

This is the nub of the matter, for it is plain that a reason must be clear, which justifies on fundamental *i. e.* constitutional principles, the selection of one class of landlords for regulation, and one class of tenants for favor and protection.

The reason is clear; in property other than dwellings there was not, or there was not shown to be, such scarcity as existed in respect of livable rooms and apartments; the consequences of a scramble for stores or offices are not of the same deteriorating social character as is one for homes; men and women who want a place to sleep are peculiarly at the mercy of landlords, and that inequality in bargaining recognized in *Holden* v. *Hardy*, 169 U. S. 336, as a proper reason for regulation was present; and new buildings would certainly cost very much more than had the old ones, wherefore if price regulation or limitation as to them was attempted in advance of completion at unknown cost,—it would probably prevent exactly what was necessary to relieve the shortage that occasioned the evil to be combatted.

If the power of classification by legislatures was ever judicially limited, the effort has been abandoned, unless some limitation can be found in the statement that a distinction is arbitrary where no "state of facts reasonably can be conceived that would sustain it" (*Bast* v. *Van Deman, supra*). No such rule, if it be a rule, finds application here.

It is unnecessary to further parade decisions; from the *Slaughter House Cases* (16 Wall. 36) to that of the *Producers Co.* (*supra*) at the last term of Court, all the Fourteenth Amendment decisions are alike in refusing dogmatic definition, and avoiding production of results by an inexorable legal logic; much, indeed most has been left to circumstances as they arose, so that reported cases are not so much precedents of law, as instructive and illustrative historical incidents; the effort has been to apply a sort of "rule of reason" to eternally changing facts.

Having examined the reason for these laws to the best of our ability, we hold it shown that an emergency existed, and that the resultant evil threatened to spread; that the legislative remedy is of a kind long known to the law, though not hitherto used in America, that the business affected is one capable of "superinducing the right of public regulation," that the reason assignable for such regulation as embodied in the statutes challenged at bar, is the kind of reason justifying this kind of statutes, and it being sufficient in kind we are not, and as a court cannot be concerned with its sufficiency in degree.

We speak only in the present tense; and hold the statutes complained of to be constitutional; but it does not necessarily follow that because they violated no

fundamental law in September or December, 1920,—they will never so violate. Should it be shown hereafter that the reason for the laws had in fact passed, questions may arise not now before us, and as to which we do not wish to seem to foreclose discussion.

It appearing that no ground exists for either suit in equity or action at law, it is ORDERED: That the bill be dismissed, without prejudice and without costs.

Mayer, and A. N. Hand, D. JJ., concur.

December 15, 1920.

SUPREME COURT.

New York County.

Special Term, Part I, December 17, 1920.

BRANDT

v.

BERLEIT, ET AL.

COHALAN, J.—Defendants move for an injunction *pendente lite*. The plaintiff seeks to nullify the recent Housing Laws of 1920 by substituting summary injunction remedy for the temporarily suspended summary proceedings of the Municipal Courts. The remedy herein sought was denied recently in the case of *Brandt* v. *Weil* (New York Law Journal, November 2, 1920). The purpose of the recent legislation was to preserve at reasonable rentals, on account of a grave emergency, and for only two years the *status quo* in the City of New York, in regard to the occupancy and possession by tenants of dwellings and apartments, irrespective of the terms and conditions of their leases. In many cases these laws have operated harshly upon landlords. But conversely, on account of economic conditions much greater hardships would have prevailed in respect of thousands of tenants in this city, if the passage of these laws had not been secured. I do not think that a court of equity would be justified in using its powers to undo these beneficent laws passed to relieve a critical situation. Motion denied.

SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT.

NOVEMBER, 1920.

JOHN PROCTOR CLARKE, P. J.
FRANK C. LAUGHLIN,
VICTOR J. DOWLING,
EDGAR S. K. MERRELL,
SAMUEL GREENBAUM, JJ.

No. 5696.

CLOSSET REALTY CO., INC.,

Appellant,

vs.

CHARLES F. WOOD,

Respondent.

Appeal by plaintiff from an order of the Special Term denying its motion for judgment on the pleadings.

The complaint alleges that the plaintiff is a domestic corporation; that on the 20th day of August, 1920, it entered into an agreement whereby it rented to the defendant an apartment in the apartment house known as 561 West 141st Street, for a term of two years commencing October 1, 1920, at the yearly rental of $1,080, payable monthly in advance on the 1st day of each month; that the defendant has refused to pay the installment due on October 1st, 1920, amounting to $90, although due demand has been made therefor; that the plaintiff duly performed all the terms of the lease on its part to be performed; that by reason of the premises, there is due to the plaintiff from the defendant $90, for which sum, plaintiff demands judgment.

The answer denies that there is due to the plaintiff from the defendant the sum of $90, and alleges that the premises are located in a city of the first class, and that the rent set forth in the agreement alleged in the complaint is unjust and unreasonable and the said agreement under which the said rent is sought to be recovered is oppressive.

EMANUEL S. CAHN for Appellant.

CHARLES HOBBY BASSFORD for Respondent.

WILLIAM D. GUTHRIE and JULIUS HENRY COHEN, Special Deputy Attorneys-General for the Attorney General, and ELMER G. SAMMIS and BERNARD HERSHKOPF for the Joint Legislative Committee on Housing as *amici curiae*.

LAUGHLIN, J.—This lease also was made after the enactment of Chapter 136 of the Laws of 1920, and before the enactment of Chapter 944 and the defense made is a defense authorized by said Chapter 136. There is no material difference between the facts of this case and those presented in *Levy Leasing Co.* v. *Siegel*, argued and to be decided herewith and the contentions with respect to the invalidity of the statute are substantially the same. The order should therefore be affirmed on the authority of our decision in the other case with ten dollars costs and disbursements.

SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT.

NOVEMBER, 1920.

JOHN PROCTOR CLARKE, P. J.
FRANK C. LAUGHLIN,
VICTOR J. DOWLING,
EDGAR S. K. MERRELL,
SAMUEL GREENBAUM, JJ.

No. 5668.

EDGAR A. LEVY LEASING CO., INC., Appellant,

vs.

JEROME SIEGEL, Respondent.

Appeal by the plaintiff from an order of the Special Term denying its motion for judgment on the pleadings.

The complaint alleges that the plaintiff is a domestic corporation; that on June 26, 1918, it rented to the defendant a certain apartment in premises known as No. 157 West 57th Street, Borough of Manhattan, at the annual rental of $1,450, payable monthly in advance on the first day of each month; that defendant entered into possession of the premises, and on the 3rd day of May, 1920, plaintiff and defendant agreed to a renewal of the lease for the further period of two years from October 1, 1920, at the annual rental of $2,160, payable in equal monthly installments; that defendant has failed to pay the rent of said apartment falling due on the first day of October, 1920, amounting to $180, which sum is now due and owing to the plaintiff.

The answer alleges that the signing of the new lease was procured through duress and a threat on the part of the landlord to terminate the tenancy at the expiration of the term; denies that there is due the plaintiff the sum of $180; as a first affirmative defense, it is alleged that on June 26, 1918, plaintiff and defendant executed a lease of said premises for two years from October 1, 1918, at the annual rental of $1,450; that on May 3, 1920, plaintiff and defendant signed what purported to be an extension of said lease for two years from October 1, 1920, at the annual rental of $2,160; that prior to the signing of the said renewal, the plaintiff stated to the defendant that if he did not sign the renewal, plaintiff would terminate his tenancy at the expiration of the existing term and cause him to move; that the defendant believed the said statement, and relied upon it, and was fearful that he would be unable to secure similar or suitable apartments owing to their scarcity; that solely by reason of such threats, coercion, and duress, plaintiff induced defendant to sign such renewal; that defendant offers the rent for the month of October, 1920, at the old rate; and as a second affirmative defense, the defendant realleges the allegations of the first affirmative defense, and further alleges that the rent reserved in the instrument of May 3, 1920, is unjust, unreasonable and oppressive.

The appeal involves the validity of Chapter 944 of the Laws of 1920, which was enacted at an Extraordinary Session of the Legislature on the 27th day of September, 1920, and took effect on that day, and the validity of Chapter 136 of the Laws of 1920, which was enacted and took effect on the 1st day of April, 1920, which it amend-

ed. Chapter 944 was enacted at an Extraordinary Session of the Legislature duly convened by the Governor on the 20th day of September, 1920. Chapter 944 was recommended for enactment in a report made to the Legislature on the day it convened in Extraordinary Session by a Joint Legislative Committee on Housing, appointed in the month of May, 1919. On the day the Legislature so convened, it received a message from the Governor as follows:

"STATE OF NEW YORK
EXECUTIVE CHAMBERS
ALBANY, SEPTEMBER 20, 1920.

To the Legislature:

I have exercised the power vested in me by the Constitution to call the Legislature into Extraordinary Session because I am convinced that an emergency confronts the State, and because I feel that we cannot wait until the regular session to find remedies for its relief.

In the period of reconstruction, many problems have been pressing for solution which are not ordinary in their nature, but are the direct result of war conditions. None of them has so taxed the agencies of government as the question of proper housing facilities.

In January of 1919, I charged the Reconstruction Commission with the duty of making an exhaustive inquiry into this subject to the end that the legislative and executive branches of the Government might be in a position to deal with this problem, which even at that time promised to be acute. Your Honorable Bodies, believing that facts should be produced upon which to predicate remedial legislation, appointed a Committee from both houses of the Legislature, to investigate the subject. This Committee reported at the last session of the Legislature and several legislative proposals arising from their report were enacted into law. It was admitted at the time that they were

expedients intended to alleviate the situation temporarily. As we understand legislation, they were entirely regulatory. Two vital objects were overlooked; one, the encouragement of building construction, and second, the adoption of a State policy looking to the future study and development by the State of this all important question of adequate housing facilities.

Experience of several months has revealed to us the weaknesses of the temporary expedients and had made more acute the necessity for encouragement of building operations so far as it can be done by law, and the creation of State agencies for future use.

We, therefore, at this session, as I see it, have three distinct branches of the subject with which to deal.

First, the strengthening of the temporary statutes enacted at the recent session.

Our temporary laws of last spring have fallen short of what was expected of them and selfishness and greed on the part of not a few landlords has brought about an indescribable condition in the Municipal Courts in New York City. I am informed by the President of the Board of Justices of the Municipal Court that there are pending for October first, more notices of dispossess proceedings than were filed during the whole year of 1919 —approximately 100,000. The court rooms have been crowded beyond their capacity by tenants seeking relief. These figures of themselves cannot communicate the harassing uncertainty and the misery caused by the constant repetition of these proceedings. It has been publicly stated by the Health Commissioner of the City of New York that this condition of uncertainty is alone a direct menace to the health and welfare of the community. The housing shortage leaves the citizen nowhere to turn. Families have been broken up and dispersed generally through the city, or crowded and huddled into the homes of relatives until the health, welfare and morality of the community is seriously threatened.

It seems a very great pity that the decent, honest landlord should be obliged to come under a regulation clearly not intended for him, but made necessary by the willful and deliberate profiteer, who would turn this great crisis in our State's history to his personal advantage. The people, to some degree at least, have managed to protect themselves from other forms of profiteering, but they are helpless to deal with this one, because a home everyone must have. Have in mind that no regulatory legislation, properly drafted, will have any disastrous effect upon an honest man. It has been my experience that only those who seek to live outside of the moral law have any great fear of State regulation. The State has a conscience and it will regulate fairly.

Inasmuch as regulation must be exercised through the agency of our courts, it is to existing statutes or the enactment of new ones supplementing them that we must turn our attention.

Landlords have been given the special privilege of summary proceedings in order to regain immediate possession of their premises. This privilege does not belong to any landlord as a matter of inherent right. Inasmuch as the evidence laid before us indicates that summary proceedings are being grievously abused, in a crisis of this kind, the State does only its duty when it withdraws or modifies them.

There is an abundance of evidence that undesirability or failure to pay rent is not in the majority of instances the basis of the application for the writ of summary removal, but on the other hand, it is the operation of the profiteer who would remove the desirable and paying tenant in order to create a vacancy which may thereafter be offered to the highest bidder. As a result of this, families have been shifted from place to place without rhyme or reason and the unscrupulous and selfish have profited immensely by it. October first was to be the height of the harvest. The State should step in and use its power to disappoint them.

I believe the emergency to be such that the strong arm of the State must reach through its courts and protect the people for at least one year, until the crisis shall have passed or the situation is relieved. The courts should be empowered where it is evident that the dispossess is requested for the purpose of unreasonable rent-raising, to suspend the dispossess remedy for an adequate period. You might well hold that the courts shall have the power to suspend rent increases and place the burden of proof upon the landlord to show the necessity for the increase or any part of it. No honest man can suffer from such legislation. The court will undoubtedly give its approval to increases that can be justified.

Inasmuch as the personnel of your committee remains the same, I have no doubt that they will be in a position to suggest to you other specific amendments to the existing so-called rent laws; and that they will strengthen them where experience has proven them to be weak.

The second phase of the question before us is how to stimulate building construction. Figures gathered from the most authentic sources indicate that the State is years behind its normal housing accommodations. Between June 1, 1919, and July 1, 1920, in the City of New York, 3,652 individual apartments designed for the same number of families were constructed, but as an offset to that new construction there were demolished or converted for non-residential uses 3,833 apartments, leaving 271 less homes at the end of that period, although the question has been constantly before the public for a year and a half.

The housing shortage is felt not alone in the City of New York but all cities in the State are passing through the same difficulty. In New York City at least 50,000 homes are immediately necessary. It should therefore be your chief objective during the Extraordinary Session to encourage, so far as that can be done by law, the building of houses.

The commercial and economic supremacy of the State is threatened by this shortage. No commu-

nity can expect to achieve an industrial growth if it is unable to house its working population properly. Labor shortage can be frequently attributed to improper housing accommodations. It is only human for a man to want to live where he can rear his family in decency and comfort. If some other State offers him that opportunity, it comes into sharp competition with our own State, and good housing is therefore a necessity for the promotion of commerce and industry.

The question of stimulating building growth becomes a very practical one because of the fact that the cost of building operations has trebled since 1915. Building at this time is considered an unprofitable field and money will not enter it, nor can it be forced into it by law, but we may be able to offer an inducement to capital to come back into the field and building may be resumed in a natural way if the State can find some way to offset the increased costs.

A very vital element in the carrying cost of a newly constructed building is the taxation to which it is subject. While I do not, as a matter of policy, favor tax exemptions, the emergency is such at the present time that it might be well to consider the enactment of a law exempting from taxation for a period of years, with proper restrictions, buildings used for dwelling purposes whose construction is undertaken within such a period as will assure an immediate increase in housing accommodations. I believe this will aid in putting new construction on a fair competitive basis with buildings erected before the war and will assist in creating a market for new buildings.

Much has been said about the exemption of mortgages from the provisions of the State Income Tax. The State's Tax is very small and we can give no guarantee of federal legislation along the same line. I, therefore, do not place much faith in this suggestion as offering any great remedy. However, your Legislative Committee is in possession of more facts on this subject than I can lay before you.

Loaning institutions apparently have not kept in step with the times and have spent their energy in securing investments bringing a larger return than real estate mortgages. For instance, our Savings Banks and Mutual Insurance Companies are organized not for profit but as depositaries for the people's money, and it would be entirely in keeping with their purpose if their funds were made available to a greater extent to meet the people's needs, by investing a larger portion of them in bond and mortgage.

In 1914, there was created by statute a State Land Bank having for its purpose assistance to building and loan associations. Inasmuch as the proceeds from the sale of the bonds of the Land Bank are used for the building of homes, the State would do everything that it possibly can to make the bonds a more desirable purchase. We have already exempted them from the provisions of the State Income Tax, but the abnormal yield at this time from other securities is such as to make them an undesirable investment. It might be well that the State use its own moneys or a portion thereof now in the various sinking funds of the State to purchase these bonds. It might also enable municipalities of the State to invest in such bonds.

These recommendations are made in the hope that the legislation which they suggest will bring voluntary capital into the building market. That, of course, remains to be seen. If the present condition be not thus relieved and the health of the community continues to be menaced, then we have a grave public emergency to meet such as would confront us in a time of epidemic or of catastrophe. Clothed with the proper safeguards the Police power of the State should be extended to municipalities in order that they may be enabled either to build or lend their credit to the building of houses.

Undoubtedly, the State as well as the municipalities should be in a position to extend its credit either through the medium of the State Land Bank or a specially created agency.

There is one avenue of possible direct State aid in an emergency which might be applied at once. The State apparently owns considerable property that was either acquired by escheat or was bought in at tax sales. It might be well to direct the Comptroller either to arrange favorable short term leases or dispose of the property, if it is to be used for housing at such prices as will encourage its development.

It has been called to my attention by the report of the Reconstruction Commission and by hearings held before the Joint Legislative Committee and by private citizens, that the high cost of building materials is artificially stimulated. No doubt, one very vital aid to construction would be the elimination of any combinations to increase the prices of building materials. Investigation of this situation by an agency of your own creation is, to my mind, highly desirable.

We come now to the third consideration—provision for a permanent housing policy.

The existing accommodations are far from the standards of adequacy that a normal family has the right to expect. I was conscious that the State was facing a problem of housing, both from the fundamental point of view, and from that of the shortage in the supply, when I asked the Reconstruction Commission to study and to suggest a permanent policy for the State in this regard.

The evils of bad housing are only too apparent in New York City—but my study and experience here have shown me that an inadequate standard of housing exists in nearly every city and town in the State. The Tenement House Law has some measure of beneficent effect, but in the smaller communities investigation shows that housing is without even elementary supervision as to safety and sanitation.

Nor is the situation of such recent growth as is popularly supposed. Since we passed the Tenement House Law of twenty years ago, nothing constructive has been done. We rested with that achievement and every attempt to aid in develop-

ing a solution for other communities has met with failure.

Any attempts to amend the present Tenement House Law are likely to be viewed with alarm and suspicion if they are aimed at detailed and specific sections of the law. It is, however, probable that the law can be made to fit present conditions if it is applied with greater elasticity. I would, therefore, recommend as an aid to the construction of multi-family homes, that there be created for the tenement house department a board of appeals similar to or identical with the one at present functioning for the building department of the city of New York. If such a board is constituted, deviations from the letter of the law, which make possible new methods of construction, can be carefully considered by such a board and the law be less hampering in its effect.

Building houses for some groups in the population has become an unprofitable business. Hence, these groups have for a generation lived in the left-over housing, or in the cheapest and most poorly-planned type of home that a grudging and unrealizing community would provide. As a result of the present emergency, a still larger portion of our population is being forced back into houses of a standard below that which we have accepted as decent American homes.

Except for the report of the Reconstruction Commission and the findings of your own committee, we have been aided by no State agency in the consideration of this very important problem. In the enactment of labor laws, we are guided by the Industrial Commission. In the enactment of health measures, by the State Health Department. In matters affecting the conservation of our natural resources, by the Conservation Commission. The Banking Department, the Insurance Department, and other State agencies all deal with special subjects that need executive or legislative action. But in housing, dealing with the elementary need of shelter and establishing homes, there is no State or local agency to aid the legislative and executive

branches of the government either in meeting an emergency, or what is more important, in helping to establish a permanent housing policy for the State. Such a policy does not necessarily mean the building of houses by the State, but it does mean the establishment of housing standards and of local development that should underlie any future growth of the cities of this State.

Granted that Your Honorable Bodies will enact measures to meet the emergency, it is important that you recognize the challenge which those insufferable conditions raise, to establish agencies for providing an enlightened and constantly developing housing policy for the future.

To this end I recommend a law which will create in each community having a population of over ten thousand a local housing board, which shall be charged with the duty of finding a solution for the local housing situation. These local boards should be required to prepare within a period to be determined by the local authorities a plan for the future development of the city and should consider local housing ordinances. A State agency should be created and the local Boards should be required to report to it at stated intervals so that there may be available at all times a body of information applicable to this subject.

The State agency, on the other hand, should first of all be directed to report to the next Legislature on a method for the development of a system of State credits for housing purposes. Through the State agency information should be made available to Local Communities that will aid them in their housing program.

These agencies, both State and Local, should be unpaid, but so far as the State agency is concerned, adequate appropriation for its expenses should be made.

This is the time for action. We are confronted with a real problem of reconstruction. Shall we remain in the dark ages of inadequate and un-American housing, endangering the health and morals of future generations of our citizenship?

Or shall we go forward with the times, and enter the new era of our democracy with an enlightened interest in the fundamental needs of our cities and our citizenship for well-planned communities that serve the industrial, commercial and social needs of the people, and homes that make for a stabilized, self-respecting, wholesome family life.

If this is accomplished, the sufferings caused by the housing crisis will not be without their compensation. The permanent fruits of this emergency should be written on the record which this State has made for progressive laws affecting human needs. It takes a serious emergency to bring a realization of deficiencies. The opportunity is yours to remedy them.

(Signed) ALFRED E. SMITH."

LOUIS MARSHALL, of counsel (LEWIS M. ISAACS with him on the brief), for Appellant.

ROSE & PASKUS, Attorneys for Respondent.

WILLIAM D. GUTHRIE and JULIUS HENRY COHEN, Special Deputy Attorneys-General, for the Attorney General.

ELMER G. SAMMIS and BERNARD HERSHKOFF, counsel for the Joint Legislative Committee on Housing, as *amici curiæ*.

LAUGHLIN, J.—The statement of the facts shows the existence of a shortage of housing accommodations resulting from the increase of the population and the practical suspension of building during the World War presenting a situation threatening danger to the public health, safety and order, and calling upon the Legislature for the enactment of any emergency legislation which it was competent for it to enact to relieve the crisis and to prevent its recurrence until the emergency passed. If it was within the power of the Legislature to enact

these statutes, they must be sustained for it is not the province of the court to review the exercise of the legislative discretionary power. It is, however, proper to observe that there is no just ground for criticising this legislation provided it is constitutional. The subject matter was thoroughly investigated and the Executive and the Legislature evidently attempted in devising and applying remedies to protect the interests of landlords as well as tenants so far as that could be done consistently with the public welfare.

Said Chapter 136 is an act relating to defenses in an action based on unjust, unreasonable, and oppressive agreements for rent of premises occupied for dwelling purposes in cities of the first class and in cities in a county adjoining a city of the first class. It recites that unjust, unreasonable, and oppressive agreements had been and were being exacted from tenants under stress of prevailing conditions impairing the freedom of contract, resulting in a congestion of housing conditions seriously affecting and endangering the public welfare, health and morals, presenting a public emergency, and provides that it shall be a defense to an action for rent accruing under an agreement, that the rent is unjust and unreasonable and that the agreement is oppressive; but hotels, lodging and rooming houses are excepted therefrom. Section Two creates a presumption that the agreement is unjust, unreasonable and oppressive if the rent has been increased more than 25 per cent. over that exacted one year before the agreement was made. Section Three permits the plaintiff in such an action or in a separate action to plead, prove and recover a fair and reasonable rent.

Chapter 944 amends Chapter 136 by re-enacting Section One, re-enacting Section Two as Section Three with an amendment applying the presumption to any increase of the rent over the year before, and re-enacting Section Three as Section Four, and by adding seven other sections and by providing that the provisions of that chapter shall continue in force until November 1, 1921, whereas the other was to continue until November 1st, 1922. The new provisions of the Chapter provide in Section Two that where the defense that the rent is unjust and unreasonable and that the agreement is oppressive is interposed, the plaintiff shall file a verified bill of particulars giving the gross income from the building, the number of apartments and of rooms in each, the number of stores, the rent received for each apartment or store for the preceding year, the consideration paid by the landlord for the building or, if he be a lessee, the rent agreed to be paid by him, the assessed valuation and taxes for the current year, the annual interest charge on any incumbrance, the operating expenses in reasonable detail and such other facts as the landlord claims affect his net income from the property, and that if he fails so to do, the complaint may be dismissed. Section Five provides that if the plaintiff in an action for rent or rental value recovers judgment by default and it is not satisfied within five days after entry and service of a copy, the plaintiff shall be entitled to possession of the premises and to a warrant for possession. Section Six provides that if in such an action, the defendant interposes the defense of unfairness and unreasonableness of the amount demanded, he must at the time of answering, pay into court an amount equal to the rent paid during the preceding

month or the amount agreed upon as the monthly rent by the agreement under which he entered, and that if he fails so to do, the defense shall be stricken out and that any deposit so made shall be applied on the judgment or otherwise as justice requires, and if the plaintiff recovers, the judgment shall provide that if it be not fully satisfied from the deposit or otherwise within five days after entry and service of copy, plaintiff shall be entitled to possession and to a warrant therefor. Section Seven provides, among other things, that where the court has jurisdiction to vacate a judgment by default, it shall have power to open a default in such an action and to amend and correct process and to grant a new trial. Section Eight forbids a stay on appeal unless the defendant pays into court the amount of the judgment and monthly thereafter an amount equal to one month's rental on the basis of the judgment, and that such money shall be paid to the plaintiff. Section Nine excepts hotels of 125 rooms or more, lodging and rooming houses occupied under a hiring of a week or less. Section Ten excepts new buildings in the course of construction and those commenced thereafter. An explanatory note to this section by the Joint Legislative Committee states that the 25 per cent. increase clause in the former section was omitted because generally misunderstood by the public and misapplied by the courts and that the new act puts the burden of proof with respect to the rent being just and reasonable on the landlord, if the rent has been raised, and that this was done because otherwise the tenant would be at a disadvantage and unable to meet the landlord's claims with respect to expenses. It is also stated that the purpose of the act was to prevent a

landlord from obtaining an increase of rent without bringing an action and having the court determine whether the rent demanded is fair and reasonable and that the trial may be by the court or by a jury if either party so desires, and that the provision requiring the tenant to pay into court was to protect the landlord against irresponsible tenants, and that the landlord is fully protected by giving him possession if the amount recovered is not paid promptly, and that it was believed that the rights of both parties were fully protected by this act.

Chapter 945 was enacted on the same day as 944. It amends subdivision 2-a of Section 2231 of the Code of Civil Procedure, which was added by Chapter 139 enacted on April 1, 1920. Chapter 139 limited until November 1, 1922, the remedy by summary proceedings in cities of the first class and in a city in an adjoining county, under a lease or tenancy for one year or less or under any future lease, to cases wherein the petitioner alleged and proved that the rent was no greater than the amount paid by the tenant for the month preceding the default or had not been increased more than 25 per cent. over the rate one year before, but hotels, lodging and rooming houses were excepted. Chapter 945 further limited for the period therein specified, the remedy by summary proceedings for the non-payment of rent by confining it to cases in which the petitioner alleged and proved that the rent demanded was no greater than the amount for which the tenant was liable for the preceding month, but permitted the tenant to defend on the ground that the rent was unjust and unreasonable and that the agreement was oppressive, and where that defense was

interposed required the landlord, on pain of having his proceeding dismissed, to file a bill of particulars to the same effect as is required by Chapter 944, but it excepted hotels of 125 rooms or more and lodging and rooming houses occupied under hire of a week or less and buildings in the course of construction and these thereafter commenced. The Joint Legislative Committee's note to this chapter shows that it was intended to confine the landlord to his remedy by an action for rent if he claimed more than the amount for which the tenant was liable for the preceding month.

The remedy by summary proceedings is statutory and it was competent for the Legislature to withdraw it altogether or to limit it as it did. The legislation so limiting the remedy by summary proceedings left the landlord claiming the benefit of an agreement for an increased rent to an action such as this, if he did not wish to elect to accept rent for an amount no greater than the amount paid by the tenant for the month preceding the default and to have recourse to summary proceedings for the removal of the tenant for non-payment thereof.

Chapter 136 was construed as not applying to existing leases, but only those thereafter made (*Paterno Investment Corp.* v. *Katz*, 112 Misc. 242, affirmed without opinion 185 N. Y. S. 944). Counsel for the appellant contends that Chapter 944 is unconstitutional and void both as to future and existing leases. I am of opinion that we are not called upon to decide whether the new provisions of Chapter 944 which are not a re-enactment of the provisions of Chapter 136, would be constitutional if construed retroactively as applying to existing leases, for the

lease in the case at bar was made after the enactment of Chapter 136, although before the enactment of Chapter 944; and Chapter 136 authorized the defense that the rent reserved by the agreement was unreasonable and oppressive, and the plaintiff in making the lease was chargeable with knowledge of those statutory provisions. Chapter 944 merely enlarged and extended the provisions of Chapter 136 by creating a presumption that the agreement is unjust, unreasonable and oppressive where the rent has been increased over the rent of the year before. That is merely a rule of evidence, and ordinarily it is competent for the Legislature to change the law of evidence and procedure and apply the statute to existing contracts; but the validity of that part of the statute or of the provisions thereof making it the duty of the landlord to file a bill of particulars is not presented for decision. Plaintiff's motion for judgment on the pleadings could not be granted unless the answer contains no defense. It does, however, contain the defense authorized by Chapter 136 and reenacted in Chapter 944, that the agreement with respect to rent was unjust, unreasonable and oppressive. Regardless, therefore, of the new rule of evidence attempted to be prescribed by Section 944 or of the provisions of that act with respect to a bill of particulars, the *issue* presented under either statute is the same and it is as to whether the rent exacted was reasonable. The point now presented for decision is, therefore, the same as if the lease had been made after the enactment of both statutes. The landlord stands on the lease and the tenant rests on the statutory defense that the rent reserved is unreasonable and oppressive. The lease having been made after the Legislature authorized this defense, both parties are

bound by the law with respect to the *term* of the lease; and if the statute be unconstitutional, the landlord may recover according to the agreement, but if it be constitutional, he may only recover the reasonable rental to be determined by the court or by a jury if either party demands a trial by jury.

The only remaining point to be considered is whether, in the circumstances of the emergency, by which there was and would be until new houses and apartments were built this serious shortage of housing accommodations, the owners of existing houses, tenements and apartments which, in the City of New York, are occupied by far the greater part of the inhabitants as tenants, had a constitutional right to take advantage of their tenants and of others desiring accommodations and exact exorbitant rentals free from the exercise of any legislative regulation or control, or whether it was competent for the Legislature thus summoned in Extraordinary Session by the Executive, and fully advised with respect to these conditions, to apply this remedy to promote the general welfare and preserve the public health, safety and order, not by taking possession of private property either for public or private purposes but by limiting during the period of the emergency such owners who saw fit to lease their premises to the recovery of reasonable rentals.

The learned counsel have presented able and elaborate arguments and briefs covering nearly the entire field of judicial decisions with respect to the validity of statutes enacted in the exercise of the police power, the scope and limits of which the courts have wisely refrained from attempting to define. I deem it unnecessary to discuss the authorities at length and shall refer only to those

sufficiently analogous on the facts to light our way to a correct decision. That such exercise of the police power has never before been attempted in this jurisdiction does not prove that it does not exist. That has often been declared. *Kujeck* v. *Goldman*, 150 N. Y. 164-8; 1 Kent 477; also *German Alliance Insurance Co.* v. *Kansas*, 223 U. S. 359; see also Cooley on Torts, 13-15. Although the State Constitution forbids the taking of private property for public use without just compensation (Article I, Section 6) and thereby impliedly forbids such taking for private use, and both the State and Federal Constitution provide that no person shall be deprived of life, liberty or property without due process of law, and the Federal Constitution affords all the equal protection of the laws (State Constitution, Article I, Section 6; Federal Constitution, 14th Amendment), yet it is well settled law that these provisions permit, for the public welfare, safety and health, the regulation of the use of private property and the regulation of the liberty of contract to an extent seriously affecting the use and value of property and at times destroying it and materially limiting and restricting the making of contracts (*Lincoln Trust Co.* v. *Williams Building Corpn.*, 229 N. Y. 313; *Cockcroft* v. *Mitchell*, 187 App. Div. 189, 194; *Stone* v. *New York*, 25 Wendell 157; *New York* v. *Lord*, 17 Wendell 285; 2 Kent's Comm. 339). The owner of real estate in a densely populated area may lawfully be precluded from building thereon until plans in compliance with laws and regulations deemed necessary for the public health and safety have been filed and approved, and even after building according to existing laws the owner, while de-

voting his building to a particular private use, may be required to make changes and alterations therein deemed necessary for like purposes, no matter how burdensome, and his only alternative is to discontinue the use (*Health Dept.* v. *Rector*, 145 N. Y. 32; *Tenement House Dept.* v. *Moeschen*, 179 N. Y. 325). So, too, an owner of private property who devotes it to a use in which there is a direct public interest, such as storing and elevating grain or conducting a warehouse or an inn, subjects such use of his property to the police power of the State with respect to regulations fixing the charge to be made for the services rendered and the accommodations furnished (*Munn* v. *Illinois*, *supra*; *Budd* v. *New York*, 143 U. S. 517, affirming 117 N. Y. 1; *Brass* v. *Stoser*, 153 U. S. 391; *Nash* v. *Page*, 80 Ky. 539; *Girard Storage Co.* v. *Southwark Co.*, 105 Pa. St. 248). One of the grounds recognized in the decisions cited for the intervention of the state through its police power is that such owner or owners have a monopoly of the business and without such regulation might exact unjust charges. The scope of the decision in *Budd* v. *New York*, *supra*, is emphasized by the fact that Justice Brewer dissented in a vigorous opinion, concurred in by Justices Field and Brown, and took the point that the power to regulate should be limited to monopolies of law, as where exclusive privileges are granted, and should not be extended to monopolies of fact, which may be broken at will by others, and he cites as an illustration, the erection of an office building which may give for the time being a monopoly of the business but which may be broken by others, and in such case, he was of opinion that it would not be competent for the

Legislature to regulate the rentals to be charged. It is quite conclusive, I think, that there may be a monopoly of housing conditions, and the Legislature had before it facts presenting a *collective* monopoly of housing accommodations in an emergency from which no relief could be afforded through breaking the monopoly by new buildings for a considerable period of time, and where the landlords although not shown to be acting in concert were quite generally taking advantage of tenants and thereby presenting an intolerable condition if the owners were to be left free to exact exorbitant rentals. It is not, however, necessary now to decide whether it would be competent for the Legislature at any and all times to regulate leasing on the theory that the leasing of houses, tenements and apartments to the extent that it is carried on in this great city, where comparatively few own their own homes, constitutes an appropriation of the buildings to a use in which the public is so directly or intimately interested as to warrant its regulation in ordinary times, for that has not been attempted. During the continuance of the emergency I think it was competent for the Legislature so to regulate it. No one questions the validity of the usury laws, which have existed from time immemorial for the purpose of preventing oppression by money lenders who, without regulation by statute, could take advantage of the necessities of those desiring the use of money and exact exorbitant amounts therefor. Those laws are, I think, analogous to that now before the court, which was enacted for the purpose of preventing similar oppression by those who during the emergency have many applications for leases not only from

residents of the State whose welfare is its especial concern, but competing non-residents, and are in a position to exact and are exacting unreasonable rentals, and are thus taking advantage of those who have no homes of their own and are obliged to submit to their exorbitant demands, for they are not free to contract because everywhere they turn for shelter they are met with like exorbitant demands. This, I think, is a matter of great public concern warranting the intervention of the Legislature, which of course cannot compel the owners to open their doors and admit those who are without homes, for that would be a taking of the property; but it may, I think, provide that for the period of the emergency so long as they see fit to lease their property and enjoy the protection of the state, they must deal justly with their tenants. In *C., B. & Q. R. R. Co.* v. *McGuire* (219 U. S. 549), a statute of Iowa prohibiting contracts between a railroad and its employees limiting the liability for injuries in advance of the injury, and providing that the subsequent acceptance by the employee of the benefits of the contract should not constitute satisfaction of the claim, was sustained as a valid exercise of the police power, not on the theory that State control over the corporation was reserved by its charter, but on the ground that it was not an undue interference with the liberty of contract preserved by the 14th Amendment. In that case the court said "the Legislature has necessarily a wide field of discretion in dealing with the relation of employer and employee in order that there may be suitable protection of public health, safety and peace and good order, through regulations designed to insure wholesome

conditions of work and freedom from oppression." The use of the police power for the promotion of harmonious relations between capital and labor engaged in a great industry was assigned in *McLean* v. *State of Arkansas* (211 U. S. 539) as the ground for sustaining a state statute requiring that in determining the wages of miners, coal should be measured before being screened. The court there, after citing many decisions, said, "It is then the established doctrine of this court that the liberty of contract is not universal and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to protect the safety, health and welfare of the people." The court also placed emphasis on the fact that disputes and controversies between employers and employees were constantly arising and had been brought to the attention of the Legislature. In *Knoxville Iron Co.* v. *Harbinson* (183 U. S. 13) a state statute requiring all employers to redeem in cash store orders issued in payment of wages was sustained as a proper exercise of police power. In that case, the United States Supreme Court quoted with apparent approval from the opinion of the Supreme Court of Tennessee to the effect that the statute tended toward equality between employer and employee in the matter of wages and was "intended and well calculated to promote peace and good order and to prevent strife, violence and bloodshed," and that therefore without regard to the state's reserved power over corporate employers, it was valid as a general regulation with respect to individual employers as well, and as a wholesome regulation adopted in the proper exercise of the police power. The court there

cited *Holden* v. *Hardy* (169 U. S. 366) as sustaining the validity of a statute regulating employment of working men in underground mines and fixing their hours of labor, on the grounds that it was a valid regulation of *the right to contract* and not class legislation, and that it did not deprive the parties of the equal protection of the law or abridge the immunities of the defendant as a citizen or deprive him of his property and liberty without due process of law, and was a valid exercise of the police power. The court then cites *Orient Insurance Co.* v. *Daggs* (172 U. S. 557) where a state statute providing that in an action on an insurance policy for loss or damage by fire, the insurance company should not be permitted to deny that the property insured was worth at the time the policy was issued the full amount of the insurance, was sustained as a valid limitation upon *the right of contract* notwithstanding the fact that the parties had contracted otherwise. In *Frisbie* v. *United States* (157 U. S. 160) the court held that the liberty of contract preserved by the Constitution is not absolute and universal and may in many instances be regulated and limited, and although in that case, the point presented for decision was with respect to the validity of a statute limiting the charges of a pension attorney, the opinion was not confined to the power of the Congress with respect to pensions. In *Sawyer* v. *Davis* (136 Mass. 239) where the ringing of bells and the sounding of gongs and whistles in a factory had been duly enjoined as a nuisance and was thereafter authorized by statute, it was held that the statute was a proper exercise of the police power and that it superseded the decision as between the parties.

The Court there expressed the opinion that the Legislature could not deprive a party of a vested right to recover damages for prior injuries or the damages or costs awarded by an existing judgment, but that the Legislature might declare *for the future* "in what manner a man may use his property or carry on a lawful business," subject only to the limitation that the law must be reasonable and for the public welfare and that the very purpose and object of the exercise of the police power is to change the rights of citizens as they previously existed, and that rights of citizens accruing after the statute are to be governed by it, but not rights which have accrued. The New York Workmen's Compensation Law materially interferes with and regulates the making of and liability under private contracts, and its validity was challenged as in violation of the freedom of contract guaranteed by the Federal Constitution, although the statute was authorized by the State Constitution, but it was sustained as constitutional (*New York Central R. R. Co.* v. *White*, 243 U. S. 188). In *Wilson* v. *New* (243 U. S. 332) an act of Congress fixing temporarily the wages to be paid by carriers to certain classes of employees with whom the carriers had been unable to agree and who threatened to strike, which would have interrupted inter-state commerce and might have resulted in public disorder, was sustained notwithstanding the fact that it was conceded that the Congress had no power to regulate such wages permanently. That decision supports anticipatory legislation by holding that it is not necessary for the legislative body to await the crisis which would authorize it to act but may act in advance to avert a crisis.

In *German Alliance Insurance Co.* v. *Kansas* (223 U. S. 389), a state statute regulating the rates to be charged for fire insurance under private contracts was sustained as within the police power of the state, on the theory that the business was sufficiently "clothed with a public interest" to subject it "to be controlled by the public for the common good," and although the business was lawful, requiring no license, and the parties were free to contract or not, still the statute was not in violation of the 14th Amendment to the Federal Constitution guaranteeing the liberty of contract. In *American Coal Mining Co.* v. *The Special Coal and Food Commission of Indiana, et al.* (Fed. Rep.), the United States District Court for the District of Indiana, 3 judges sitting, on September 6, 1920, sustained a law authorizing a commission to fix reasonable prices to be charged for coal as a valid police power regulation, although it operated on coal theretofore mined as well as coal to be mined in the future, for it affected all sales thereafter made. That case is merely cited to show the trend of modern decisions, but it is unnecessary to go to that extent in the case at bar.

That the police power may be exercised with respect to new conditions where the public interests require it, and that a state may itself directly use public funds collected by taxation, or authorize a municipality to use them in a manner encroaching upon what has heretofore been recognized as purely private enterprises, is shown by the decisions in *Greene* v. *Frazer* (253 U. S. 235), where legislation authorized by the Constitution of North Dakota, by which the State engaged in the banking busi-

ness, in erecting and operating warehouses, elevators and flour mills, and in constructing and renting homes for its inhabitants, was sustained as not contravening the 14th Amendment, prohibiting the taking of property for taxes without due process of law; and in *Laughlin* v. *City of Portland* (111 Me. 286), and *James* v. *City of Portland* (113 Me. 123, aff'd 245 U. S. 217), where it was held that a city could be constitutionally authorized to buy for and sell to its inhabitants wood and coal during an emergency, and in *Holton* v. *City of Camilla* (153 Ga. 560), where it was held that a city could be empowered to establish a municipal ice plant for its inhabitants.

It is to be borne in mind that there has been no attempt to compel landlords to make leases, and so far as this statute, construed not retrospectively but prospectively, as I am construing it, is concerned, they are at liberty to discontinue using their property for the housing accommodations of others. The Legislature has provided merely that so long as they continue to use their premises during the period of the emergency, they must not take advantage of the houseless and, by leasing to the highest bidder, accommodate non-residents perhaps to the exclusion of citizens of this State, and unduly oppress residents of the State, who by duress of the circumstances may be obligated to agree to unconscionable, oppressive and extortionate leasing contracts. Doubtless the Legislature apprehended that the legislation enacted at the Extraordinary Session would be attacked as unconstitutional, and the legislators may have anticipated that possibly some of the other statutes might not be sustained. It did, I think, however, exercise great fore-

sight in framing the statute in question for, if it be sustained as constitutional, it will in its practical operation remedy, if not fully, practically every evil that it was anticipated would follow if the execution of the laws as they theretofore existed were permitted. It is manifest that the legislation was designed to avert the crisis incident to the shortage of housing accommodations that might have been brought on if hundreds of thousands of the inhabitants of this great metropolis were evicted and unable to find living accommodations and also to prevent profiteering landlords from taking advantage of the emergency, which left their business of leasing their property for such uses substantially without competition and left them in a position where they could exact unreasonable and unconscionable and extortionate rentals for the use of their property, while they were protected by the usury laws from having to pay more than six per cent. on any loan of money that they had obtained or might obtain on the security of their premises. By restricting landlords to making contracts for reasonable rentals during the period of the emergency, the Legislature left nothing to be accomplished by the substitution of one tenant for another who was evicted, for all agreements for rentals thereafter made whether with tenants in possession or with new tenants were required to be reasonable. Assuming, without now deciding, that the other laws enacted at the same time, which were designed to prevent the wholesale eviction of tenants, were unconstitutional and that the landlords were at liberty to evict at the expiration of the term or to recover possession by electing to terminate the tenancy for a failure to pay the

rentals agreed to be paid—there was left to the landlords no incentive to carry out their threats of wholesale evictions, provided the statute now under consideration was sustained as constitutional; and therefore, even on the assumption stated, the evictions would be reduced to a minimum. In ordinary times, doubtless the making of leases may well be and should be left to the regulation of the law of supply and demand; but in this emergency there was not freedom of contract on the part of the tenants and they were subject to extortion and oppression by landlords. It is, I think, no extension of the doctrine of the authorities cited with respect to the power of the Legislature to forbid during this emergency the exacting of oppressive agreements for extortionate rentals by prohibiting the recovery of more than reasonable rentals.

The statute is also attacked on the ground that it fails to prescribe a standard by which what constitutes a reasonable rental may be decided. The Legislature might have provided that a landlord should not exact a rental by which he would receive more than a specified percentage on his investment, but if that percentage were fixed too low, the statute would be open to attack on the ground that it was confiscatory, and whether it would be sustained as constitutional or annulled as unconstitutional would then have to be determined by the very standard prescribed in this statute, namely, whether it permitted the landlord to receive a reasonable income on his investment (*Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 152; *Municipal Gas Co.* v. *Public Service Comm.* 225 N. Y. 59).

The Federal Lever Food Control Act, so called, declared it to be unlawful for any person to make an unjust or unreasonable rate or charge in handling or dealing with any necessities or to combine with others to effect excessive prices for necessaries and, like the statute in question, it prescribes no other standard. The Circuit Court of Appeals, 2nd District, on May 26th, 1920, in *C. A. Weed Co.* v. *Lockwood* (266 Fed. Rep. 785), sustained a conviction under that statute and overruled the point that it prescribed no standard, which is the precise point now made here.

It is further contended that the statute is void on the ground that it is unjustly discriminatory, in violation of the provision of the 14th Amendment of the Federal Constitution. The statute is confined to property devoted to the same use and it embraces all such property and applies only to the property, the use of which during the emergency required the intervention of and regulation by the Legislature, and therefore it cannot be said that it is unconstitutional on this ground (*Budd* v. *New York, supra; People* v. *Havnor*, 149 N. Y. 195, 205; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 235).

It follows that the order should be affirmed with $10 costs and disbursements.

MERRELL and GREENBAUM, JJ., concur.

CLARKE, P.J., and DOWLING, J., dissent.

SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT.

NOVEMBER, 1920.

JOHN PROCTOR CLARKE, P. J.
FRANK C. LAUGHLIN,
VICTOR J. DOWLING,
EDGAR S. K. MERRELL,
SAMUEL GREENBAUM, JJ.

No. 5666.

CLEMILT REALTY CO., INC.,
Appellant.

vs.

CHARLES F. WOOD,
Respondent.

No. 5668.

EDGAR A. LEVY LEASING CO., INC.,
Appellant.

vs.

JEROME SIEGEL,
Respondent.

CLARKE, P. J. (dissenting).—Recognizing that the courts have never yet laid down the limitations of the police power, all of the cases which I have been able to examine dealing with the subject make that power subject to the Constitution. In my judgment, the acts under consideration in these cases violate the fundamental principles of the State and Federal Constitutions, in that the result is either to take private property for public use without due compensation, which is not permissible, or to take private property for private use, which has never been allowed. They also, in my judgment, have the ef-

fect of depriving the owners of a certain class of property of due process of law, and destroy the fundamental right of private ownership in property, which has heretofore been sedulously protected by the Courts under constitutional provisions, and take away the freedom of contract in regard to specific property within a limited territory, to wit, real estate used for dwelling purposes in the City of New York.

Realizing that these questions should be submitted as speedily as possible to the Court of Appeals, and that so much has been written by so many courts, I content myself with this brief expression of dissent, and of my agreement in the views of Mr. Justice Blackmar in his more extended discussion of the subject in *People ex rel. Rayland Realty Co. v. Fagan* (N. Y. Law Journal, Dec. 9, 1920).

SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT.

NOVEMBER, 1920.

JOHN PROCTOR CLARKE, P. J.
FRANK C. LAUGHLIN,
VICTOR J. DOWLING,
EDGAR S. K. MERRELL,
SAMUEL GREENBAUM, JJ.

No. 5663.

JACOB L. GUTTAG,

Appellant,

vs.

HYMAN SHATZKIN,

Respondent.

Appeal from an order of the Supreme Court, Bronx County, denying plaintiff's motion for judgment on the pleadings.

FRANCIS M. SCOTT (I. Maurice Wormser and Julius H. Zieser with him on the brief), for the Appellant.

GEORGE L. INGRAHAM and JOHN M. STODDARD for Real Estate Board of New York as Amici Curiae.

GILBERT RAY HAWES for the Respondent.

WILLIAM D. GUTHRIE and JULIUS HENRY COHEN, Special Deputy Attorneys-General for the Attorney General.

ELMER G. SAMMIS and BERNARD HERSHKOPF for the Joint Legislative Committee on Housing as Amici Curiae.

JOSEPH A. SEIDMAN, as Amicus Curiae.

LEONARD KLABER, as Amicus Curiae.

Laughlin, J.—This appeal involves the validity of Chapter 947 of the Laws of 1920, which was enacted at the extraordinary session of the Legislature duly convened by the Governor on the 20th day of September, 1920, and to which he presented the message set forth in full in the statement of facts in *Edgar A. Levy Leasing Company, Inc.*, v. *Siegel*, argued and to be decided herewith. That chapter repealed §1531a of the Code of Civil Procedure, which was added by Chapter 135 of the Laws of 1920, and added a new section 1531a declaring that owing to a public emergency no action should be maintained for the recovery of the possession of real property in a city of one million or more inhabitants or in a city in a county adjoining, occupied for dwelling purposes, except an action on the ground that the person is holding over and is objectionable, in which case the landlord shall prove that he is objectionable, or an action where the individual owners seek possession for their personal occupancy or where possession is sought to demolish the building and construct a new one for which plans have been filed and approved; and it was provided that the section should remain in force until November 1st, 1922. Section 1351a, as originally enacted and added by said Chapter 135, provided that in an action to recover the possession of real property on the ground that the person in possession is holding over after the expiration of his term or after a default in the payment of rent, the answer might set up as a defense or counterclaim any state of facts which might be pleaded as a defense or counterclaim under the provisions of Title II of Chapter 17 of the Code of Civil Pro-

cedure relating to summary proceedings. Chapter 137 enacted in April, 1920, related to summary proceedings in cities of the first class and cities in counties adjoining, where the recovery of premises occupied for dwelling purposes, other than hotels, lodging or rooming houses, was sought on the ground that the occupant was holding over after the expiration of his term and was declared to be emergency legislation and entitled to be liberally construed. Section 3 authorized a stay for not more than one year of a dispossess warrant and of execution for costs, on the application of the tenant showing that he was unable to secure suitable similar premises in the neighborhood after due and reasonable effort, and that the application was made in good faith and that he was willing to abide by and comply with the terms prescribed for the stay, and on other facts warranting a stay. The stay could only be granted by the court on conditions prescribed by the court, requiring among other things that the tenant deposit the entire rent for the period of the stay, or in installments, at the rate for the prior month, plus such additional amount as may be determined by the court to be reasonable, and all accrued rent, and provision was made for the landlord receiving the money so deposited. That Chapter was amended by Chapter 948 by excluding New York City therefrom and, in effect, confining it to the cities of Buffalo and Rochester.

On April 1st, 1920, when the Legislature enacted the original emergency landlord and tenant legislation, it enacted Chapter 131, adding §2040 to the Penal Law, making the lessor of any building who was required by the expressed or implied terms of any contract or lease

to furnish water, heat, light, power, elevator service, or telephone service to any occupant thereof, who wilfully or intentionally fails so to do, at any time when the same was necessary to the proper or customary use of the building or any part thereof, or who wilfully and intentionally interferes with the quiet enjoyment of the leased premises by the occupant, guilty of a misdemeanor. That section was further amended by Chapter 951 by extending its application to a representative of the landlord.

It thus plainly appears that the legislation to which reference has been made took away for the period of upwards of two years every remedy of any name or nature which a landlord had for obtaining possession of his premises where possession was not desired for the exceptional purposes specified in Chapter 947, and left the landlord subject to prosecution for the violations of the provisions of §2040 of the Penal Law if he did not continue to perform the obligations thereby imposed, unless it should be held that it was not intended to continue the contract or lease under which the occupant held, which is a point not presented for decision. The Legislature did not in express terms assume to make a new contract between the landlord and tenants. If Chapter 947 be valid, then at most the only remedy left to the landlord for the period of two years, one month and four days was to attempt to elect to hold the tenant under the former lease, on the theory that by his holding over it had become renewed from month to month or year to year, as the case may be, or to regard the tenant as a trespasser who, however, could not be removed, and to sue him for use and occupation. If he pursued the latter

remedy he could at most only obtain a money judgment enforcible by a property execution, which in many cases would be of little value. If he elected to regard the lease as renewed and to demand rent, he might have a summary proceeding under Chapter 945 if the rent demanded was not greater than the amount for which the tenant was liable for the month preceding the default, or he might sue for rent only and recover a reasonable rental, and on the failure of the tenant to pay, obtain a warrant for his removal under Chapter 944. It is quite plain, however, that the Legislature has attempted to give the tenant the privilege of remaining in possession during this period without expressly imposing any obligation upon him with respect to the payment of rent or fixing the period for which he shall be liable for rent; and while tying the hands of the landlord, has left the tenant at liberty to remove at will and without any notice to afford the landlord an opportunity of letting the premises to others. There has been here no attempt to take the property of the landlord under the power of eminent domain and afford him an adequate remedy for the value of the use thereof. It is unnecessary therefore to consider whether it would be competent for the Legislature by appropriate legislation providing for adequate compensation thus to take the property of one for the use of another. The statute transfers without making any provision for compensation the use of the property of the landlords to the tenants. Some very radical arguments have been made in favor of this legislation; but no counsel has contended that it would be competent for the Legislature, for this or any other purpose, without the exercise of the power of eminent domain and making adequate

provision for just compensation to the landlords, to compel the owners of such property against their will to admit thereto people desiring living apartments who might be unable to find them elsewhere. There is in my opinion no more justification for this legislation under the Constitution than there would be for requiring the landlords to open up vacant apartments for the use of anyone without housing accommodations. The fundamental objection to the legislation, even if it were otherwise authorized, is that the Legislature has here assumed to determine not merely facts existing in the past and at the time of the enactment of the statute, which concededly was within its province, but the facts as they may exist from day to day throughout the period during which the owners are deprived of the possession of their property, and has made inconsistent determinations with respect thereto. In other words, I think that the courts cannot well question that an emergency existed authorizing the exercise of the police power by the Legislature. But I am of the opinion that it has not adopted means appropriate to the end, having due regard to the rights of both landlords and tenants, but has arbitrarily given the tenants virtually the free use of the property of the landlord for more than two years, unless the landlord submits to the coercion and elects to proceed for rent at the former rate or for a reasonable rental, and in either of which events, if the tenant does not pay, the public morals, health and safety are deemed not to be endangered by his removal without regard to whether or not he and his family may find other shelter. In authorizing the removals in those instances, the effect of any legislative determination that it would be impossible for

evicted tenants to find other accommodations, to be found in this or the other statutes enacted at the same time, is destroyed, for surely it was not within the province of the Legislature to peer into the future and decide that if a tenant should fail to pay rent at the rate for which he was liable during preceding month or a reasonable rental determined by the court or jury, the public welfare would not be endangered or affected by his eviction but that in all other cases, the public morals, health, and safety would be so endangered by the eviction of a tenant wrongfully holding over, who, in the eye of the law, is a trespasser,—that it was necessary for the public welfare that he should not be evicted even though the owner desired to discontinue leasing his property and desired possession thereof to use it for any lawful purpose or not to use it at all. As to all other tenants, the Legislature has decreed that the landlord must permit them to continue in against his will and must continue to furnish them the accommodations provided for in Section 2940 of the Penal Law at the risk of criminal prosecution therefor; and the only remedy left to him to obtain possession of his property, with the exceptions stated in the statute, depending on the use for which he desires possession to which reference has been made, is in the two instances where he elects to take rent at the rate charged for the prior month and institutes a summary proceeding for non-payment thereof or to bring an action for the rent and in both instances, the recovery would be limited to a reasonable rental and if that were paid, the trespasser is permitted to remain in possession. The Legislature has assumed to decide in advance that at no time during the period during which it has attempted

to suspend, excepting in the instances herein stated, every remedy by which a landlord may regain possession of his property, may a tenant be removed without endangering the public health, safety and order; and that determination was evidently made on the theory at no such time will there be available accommodations for the housing of evicted tenants save in the particular instances of tenants evicted for not paying at the former rate or a reasonable rate and that it is therefore necessary thus to suspend all remedies in other cases, less otherwise the public health, morals, safety and order may be endangered by tenants and their effects being thrown into the public streets with no shelter available. I am of the opinion that it was not competent for the Legislature so to decide. The Supreme Court, in which this action was brought, is vested by the Constitution with general jurisdiction in law and equity (Article I, Section 6). The right to recover real property by an action in ejectment was a common law right (*Bradt* v. *Church*, 110 N. Y. 542; *Bryan* v. *McQuick*, 200 N. Y. 332; *Lewis* v. *Cooke*, 27 Wall. (U. S.) 446; *Prospect, etc., R. Co.* v. *Morey*, 155 App. Div. 347), and full jurisdiction over such actions is vested in the Supreme Court. By this statute the Legislature has attempted to suspend the exercise of that jurisdiction for upwards of two years and instead of leaving the court free to entertain action and decide the issues presented for decision and determine whether its process for delivering possession of the property to the owner shall be forthwith issued or withheld for a period, it has attempted to prohibit the court even from entertaining the action and deciding the issues. Surely this drastic legislation cannot be sus-

tained on the theory that it was essential to the health of tenants and their families to give them this assurance that their possession as trespassers could not be disturbed and that they need not pay for the use of the property unless they had property subject to execution, and need pay no rent unless the landlords elected to ratify the trespass and then only after a court should decide what would be a reasonable rental. It is settled law that the court has full control over writs of possession and may stay or enjoin the issuance thereof whenever the circumstances require that to be done, and that one of the grounds on which this jurisdiction is exercised is that an "oppressive use" of the writ is threatened or is being made (*Jackson* v. *Stiles*, 3 Wend. 429; *Knox* v. *McDonald*, 25 Hun 268; *Granger* v. *Craig*, 85 N. Y. 619; *Cornell* v. *Dakin*, 38 N. Y. 253; *Chadwick* v. *Sprague*, 1 N. Y. Civ. Proc. Rep. 422; *Rumsey* v. *Otis*, 133 Mo. 85; *Hay* v. *Valley Pike Co.*, 38 Pa. Sup. Ct. 145; 15 Cyc. 189; 17 Cyc. 1135; Newell on Ejectment, 816; Warvelle on Ejectment, 520; Freeman on Executions, §37). Not only has the court authority to stay the execution of its final judgments and writs, but where the process is abused, as by evicting a person who is ill, it affords a remedy by way of damages (*Preiser* v. *Wyland*, 48 App. Div. 569; *Bradshaw* v. *Frazer* (Ia.), 85 N. W. Rep. 752; see also *Herter* v. *Mullen*, 159 N. Y. 28). I do not question the power of the Legislature to legislate on this subject as by forbidding the eviction of a person who is ill or who is suffering from a contagious disease by which the public health may be endangered, and to alter and regulate the jurisdiction and proceedings in law and equity conferred upon it by Article VI, Section three, of the Con-

stitution, or to provide that during such emergency writs of possession should not issue where it is shown that the execution thereof would endanger public health, morals, safety, or order, owing to the fact that there were no available housing accommodations for the persons evicted. That would be merely a regulation of the power already vested in and possessed by the court, which, however, it could and would exercise without any such attempted regulation. Instead, however, of so providing the Legislature has attempted to withdraw from the Supreme Court, which is a coordinate branch of the State government deriving its jurisdiction and authority not from the Legislature but from the Constitution, all jurisdiction in the premises for the period specified. I am of the opinion that this constitutes a clear encroachment upon the jurisdiction of the court, in violation of Article VI, Section 1, of the State Constitution (*People ex rel. Mayor* v. *Nichols*, 75 N. Y. 582; *Alexander* v. *Bennett*, 60 N. Y. 204; *DeHart* v. *Hatch*, 3 Hun 375; *Riglander* v. *Star Co.*, 98 App. Div. 101, affirmed 181 N. Y. 531; *Mussen* v. *Ausable Granite Works*, 63 Hun 269; *Gilman* v. *Tucker*, 128 N. Y. 190).

I regard this statute also as plainly unconstitutional on the ground that it was the final enactment of the Legislature culminating in the removal of every remedy, excepting in the particular instances stated, of an owner for the recovery of the possession of real property occupied by tenants whose terms had expired and who were under contract obligations expressed in the leases or implied by law to vacate the premises and surrender possession thereof to the owner or their landlord. The power of the Legislature to take away one remedy and

substitute another is not questioned; but that was not done, and the right to an appropriate remedy by an appeal to the courts for the performance of a contract obligation is a part of every lawful contract and is read into it, and the destruction or substantial destruction by such a suspension of that remedy by a legislative act constitutes the taking of property without due process of law (*Gilman* v. *Tucker*, 128 N. Y. 190; *Fletcher* v. *Peck*, 6 Cranch, 87; *Grantly* v. *Ewing*, 3 How. (U. S.) 707; *Planters Bank* v. *Sharp*, 6 How. (U. S.) 301; *Seibert* v. *Lewis*, 122 U. S. 284; *McGahey* v. *Virginia*, 135 U. S. 662; *Ex parte Milligan*, 4 Wall. 2; *Kin* v. *Missouri*, 107 U. S. 221; *Green* v. *Biddle*, 8 Wheat. (U. S.) 1, reargument, p. 75-84; *Bronson* v. *Kinzie*, 42 U. S. 310; *Edwards* v. *Kearzey*, 96 U. S. 595; *Effinger* v. *Kennedy*, 115 U. S. 566; *Walker* v. *Whitehead*, 16 Wall. (U. S.) 314; *McCracken* v. *Hayward*, 48 U. S. 607; Cooley on Constitutional Limitations, 411).

In *Gilman* v. *Tucker* (*supra*) the court said:

> "The Legislature has no power to deny, for any cause, to a party who has been illegally deprived of his property, access to the constitutional courts of the state for relief; the denial of a remedy for the wrong inflicted deprive him of his property as effectually as if it had been taken from him by direct legislative enactment."

In *Walker* v. *Whitehead* (*supra*) the Court said

> "The laws which exist at the time of the making of a contract and where it is to be performed enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement. Nothing is more material to the obligation of a contract than the means of its enforcement. The idea of validity and remedy are inseparable, and both are parts

of the obligation which is guaranteed by the Constitution against impairment."

Cooley (*supra*) says:

> "Where a statute does not leave a party a substantial remedy according to the course of justice as it existed at the time the contract was made, but shows upon its face an intention to clog, hamper or embarrass the proceeding to enforce the remedy, so as to destroy it entirely, and thus impair the contract so far as it is in the power of the legislature to do it, such statute cannot be regarded as a mere regulation of the remedy, but is void, because a substantial denial of right."

I have not overlooked the decisions of *Edmonson* v. *Ferguson* (11 Mo. 221) and *Breitenbach* v. *Bush* (44 Pa. St. 331) and *Hoffman* v. *Charlestown Five Cent Savings Bank* (231 Mass. 324), in the first two of which it was held competent for the State legislature to suspend during the War of the Rebellion actions and proceedings against volunteers while absent from the State in the military or naval service of their State or country, and in the last of which the Soldier's and Sailor's Civil Relief Act (U. S. Stat. 1918, c. 20), authorizing and requiring the courts, in any proceeding commenced against one who is in the military service to enforce an obligation secured by a mortgage or other security in the nature of a mortgage upon real or personal property, where he owns the legal or equitable title, to stay proceedings therein on their own motion or on his application, unless it shall appear that his inability to comply with the terms of the obligation is not materially affected by reason of his military service, and forbidding in such cases a strict foreclosure under power of sale without an order of the Court,—was sustained as a war measure within the

power of Congress and, therefore, the supreme law of the land. It is manifest that those statutes, which were general and not, as here, designed to suspend the right of an owner to recover possession of his own property, were enacted on the theory of affording the defendants a reasonable opportunity to defend the litigation. In my opinion, they are not materially in point here, for the attempted suspension of the remedy by the statute in question was not to enable the interposition of any available defense, but on the assumption that there was and could be no defense and that the emergency warranted the Legislature in giving the tenants the right to remain in possession in violation of their contract obligation, not merely until they could obtain suitable accommodations, but arbitrarily and without regard to the facts as they might develop in the future for the entire period specified, and without attempting to make any adequate provision by which the landlord, who, it was evidently assumed, would be obligated to continue service to the tenants as provided in §2040 of the Penal Law, would receive compensation for the use of his premises.

There are precedents for the suspension, for a limited specified time during a financial depression or during war, by general laws, of the enforcement of contract obligations, but such suspension must be general and may not be made to fit individual cases or for particular localities (Cooley's Constitutional Limitations, 7th Ed. pp. 414 and 558; *Chadwick* v. *Moore*, 8 Watt's & Sergeant's (Pa.) Rep. 49; *Stevens* v. *Andrews*, 31 Mo. 305; *Bunn, Raigel & Co.* v. *Gorgas*, 41 Pa. St. 441; *Hasbrouck et al.* v. *Shipman*, 16 Wisc. 296; *Bull* v. *Conroe*, 13 Wisc. 260; *Holden* v. *James, Adm.*, 11 Mass. 396; *Benedict* v.

Crawford, 33 Tex. 745; see also *Gilman* v. *Tucker*, 128 N. Y. 190). That doctrine is founded upon the requirements of the public interests and welfare that the rights of creditors *to take the property of their debtors* on execution shall be suspended temporarily; but no decision has been cited, and I have found none, sustaining on any theory a statute, such as this, transferring the use of the *property of one to another* who has no right thereto, and legalizing for any period the latter's possession thereof contrary to the express terms of the contract between the parties; and in *Chadwick* v. *Moore*, *supra*, it was stated by the Court, in discussing the authority of the State to suspend executions temporarily, that if the Legislature attempted to suspend the right of a mortgagor to recover possession by an action of ejectment based on his legal title, it would doubtless be unconstitutional in that particular aspect, and that a statute suspending a remedy must operate alike on all creditors and debtors. I think there is a plain distinction between attempting to suspend generally for a limited time actions or remedies for the enforcement of contract rights by money judgments and executions for the sale of the property of the debtor and an attempt to suspend all remedies of the owners of a particular class of property for recovering the possession thereof according to the express terms of the contract under which the possession was surrendered by the owner or landlord.

I am therefore of opinion that the statute is unconstitutional and void on the two grounds stated.

Since this opinion was written, we have been furnished with a copy of the opinion of the U. S. District Court for the Southern District of New York, three

Judges sitting, in *Marcus Brown Holding Co.* v. *Feldman et al.*, recently decided, sustaining this statute; but with all due deference to the learned opinion in that case, we must follow our own views.

It follows that the order should be reversed with $10 costs and disbursements and the motion granted with $10 costs, with leave to the defendant to withdraw the demurrer and to answer on payment of the costs of the appeal and the motion.

Clarke, P. J., and Dowling, J., concur.

Greenbaum, J., concurs in result.

Merrell, J., dissents.

SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT.

NOVEMBER, 1920.

JOHN PROCTOR CLARKE, *P. J.*
FRANK C. LAUGHLIN,
VICTOR J. DOWLING,
EDGAR S. K. MERRELL,
SAMUEL GREENBAUM, *JJ.*

No. 5667.

810 WEST END AVENUE, INC.,
Appellant.

vs.

HENRY R. STERN,
Respondent.

Appeal by the plaintiff from an order of the Special Term, New York County, denying its motion for judgment on the pleadings consisting of the complaint and a demurrer thereto under Section 547 of the Code of Civil Procedure.

LOUIS MARSHALL (LEWIS M. ISAACS with him on the brief) for Appellant.

WILLIAM D. GUTHRIE and JULIUS HENRY COHEN, Special Deputy Attorneys-General Elmer C. Sammis and Bernard Hershkopf, counsel for the Joint Legislative Committee on Housing as *amici curiae*, for Respondent.

DAVID L. PODELL as *amicus curiae*.

JOSEPH A. SEIDMAN for Marcus Brown Holding Co., Inc. as *amicus curiae*.

LAUGHLIN, J.—The complaint alleges that the plaintiff is a domestic corporation; that heretofore and prior to December 8, 1919, the defendant entered into possession of an apartment in the building known as 808 West End

Avenue, pursuant to an agreement between the defendant and 808 West End Avenue, Inc. the then owner of the premises, and has since remained in possession; that the said agreement provided among other things that the term should end on September 30, 1920, and that at the end of the term, the defendant should deliver up the premises in good condition, and that the landlord should have the right of reentry for breach by the said defendant of any covenant of the said lease, a copy of which is annexed to the complaint; that on the 8th day of December, 1919, the said premises were conveyed to the plaintiff, and the plaintiff is now seized in fee thereof; that the said apartment was leased to the defendant as a private dwelling only; that the defendant refused to give up the said apartment at the termination of the lease on September 30, 1920; that acting on the authority of Chapter 947 of the Laws of 1920, the defendant is depriving the plaintiff of the possession of said property, and insists that the plaintiff's right to recover possession has been suspended until November 1, 1922; that plaintiff is not seeking to recover the property because defendant is objectionable, nor to demolish the premises in order to erect a new one in its place, nor are the premises a new building in the course of construction, nor have the premises been sold to a corporation formed under any cooperative ownership plan; that at the same session of the Legislature in 1920 which passed Chapter 947, Chapter 942 was enacted, which amended the Code of Civil Procedure relating to summary proceedings for the recovery of real property in cities having a population of a million or more by providing that no such proceedings could be had excepting the cases specifically referred

to, and which as shown by the allegations immediately preceding, are not applicable to this case; that by reason of the passage of said statutes the right of the plaintiff to recover possession of these premises is sought to be taken away for a period of more than two years, and no remedy has been created by the Legislature in the place of the remedies suspended, and no other adequate remedy exists; That by reason of the premises, Chapter 947 of the Laws of 1920 is null and void, in that it deprives the plaintiff of its property without due process of law, in violation of Article I, Section 6 of the Constitution of the State of New York and violates Section 1 of the 14th Amendment of the Constitution of the United States by depriving the plaintiff of the equal protection of the laws; and violates Article I, Section 10 of the United States Constitution by impairing the obligation of the contract between the defendant and the plaintiff's grantor, and deprives the Supreme Court of the State of New York of its jurisdiction in law in violation of Article VI, Section 1 of the Constitution of the State. The prayer for relief is for possession of the premises.

The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

The facts here presented do not materially differ from those presented in *Gattag* v. *Shatzkin*, argued and to be decided herewith, and the arguments against the validity of the statute and in support of it are to the same effect and do not require separate consideration.

It follows that on the authority of our decision in the other action, to which reference has been made, the

order should be reversed with ten dollars costs and disbursements and motion granted with ten dollars costs but with leave to the defendant to withdraw his demurrer and to answer on payment of costs of the appeal and of the motion.

Clarke, P. J., and Dowling, J., concur.

Greenbaum, J., concurs in result.

Merrell, J., dissents.

SUPREME COURT, APPELLATE DIVISION — FIRST DEPARTMENT.

DECEMBER, 1920.

JOHN PROCTOR CLARKE, P. J.
FRANK C. LAUGHLIN,
VICTOR J. DOWLING,
EDGAR B. K. MERRELL,
SAMUEL GREENBAUM, JJ.

No. 7064.

PEOPLE ex rel. H. D. H. REALTY CORPORATION,
Respondent,

vs.

WILLIAM J. MURPHY, Clerk of the Municipal Court &c.,
Appellant.

The defendant appeals from an order of the Special Term granting a peremptory writ of mandamus directing him to sign and issue a warrant upon a final order made on September 16, 1920, by the Municipal Court, Fourth District, Borough of Manhattan, in a summary proceeding duly instituted in that Court by the petitioner herein as landlord against George S. Chaims, as tenant, awarding to the landlord the delivery of the possession of certain premises.

The petition herein alleged that the petitioner is a domestic corporation; and is the owner of premises known as No. 205 East 14th Street, Borough of Manhattan, City of New York; that on September 2, 1920, the agent of the petitioner filed with the Clerk of the Municipal Court, Fourth District, Borough of Manhattan, a petition setting forth that this petitioner was the owner of the above described premises, that he as such entered into an agreement with one George S. Chaims for the hiring of a portion of

said premises for the period of one month from the 1st day of August, 1920, which term had expired; that the tenant held over without permission of the landlord, that a thirty days' notice had been served on the tenant, that the landlord elected to terminate the tenancy at the expiration of the term, and praying for a final order awarding the petitioner the possession of the premises and for a warrant to remove the tenant from the possession thereof; that on the 2nd day of September, 1920, the Clerk of the said Court issued a precept requiring the tenant to remove from the said premises or show cause on the 7th day of September, 1920, why possession of the premises should not be delivered to the petitioner; that the precept was duly served on the tenant; and that on the return day, the tenant appeared in person and filed an answer denying the allegations of the petition, except as to the ownership and possession, and alleging that he had a five year lease in writing of the premises; that on the 16th day of September, 1920, the issues raised by the petition and answer were tried before Justice Genung of the said court, and that the said Justice on that day decided the issues in favor of the petitioner and made a final order awarding the delivery of the possession of the premises to the landlord on the ground that the tenant's term had expired and he was holding over without the consent of his landlord but the Justice granted the tenant a stay of the issuance of the warrant to October 1, 1920; that no provision was made for the payment of any moneys by the tenant during the said stay; that the petitioner on

October 2, 1920, duly demanded a warrant of the Clerk of said Court, but that he refused to issue such warrant; that the said tenant is still in possession of the said premises; that no appeal has been taken from the final order; wherefore the petitioner prays for a peremptory writ of mandamus directed to the Clerk of the said Court requiring him to issue the warrant as directed in the said final order.

On this petition, an order was issued requiring the defendant to show cause on October 7, 1920, why the peremptory writ asked for should not issue and on the 21st day of October, 1920, the order was granted.

John F. O'Brien (Henry J. Shields and James D. O'Sullivan with him on the brief), for Appellant.

David L. Podell for other tenants as *amicus curiae*.

William D. Guthrie and Julius Henry Cohen as Special Deputy Attorneys-General, for the Attorney General.

Elmer G. Sammis and Bernard Hershkopf for the Joint Legislative Committee on Housing as *amici curiae*.

Charles C. Peters (I. Maurice Wormser with him on the brief), for Respondent.

Laughlin, J.—The appellant predicates his claim for a reversal on the construction of Chapter 942 of the Laws of 1920, which took effect on the 27th day of September; and the respondent claims that a proper construction of the statute requires an affirmance, but if not, then the statute, insofar as it purports to deprive the landlord of the right to dispossess warrant is unconstitutional.

The statute was enacted at an Extraordinary Session of the Legislature duly convened by the Governor on the 20th day of September, 1920.

The appellant contends that the dispossess proceeding was pending on the 27th day of September, 1920, when said Chapter 942 was enacted. By that Chapter Section 2231 of the Code of Civil Procedure was amended by adding thereto "Subdivision 1-a," which is as follows:

> "1-a. A public emergency existing, no proceeding as prescribed in subdivision one of this section shall be maintainable to recover the possession of real property in a city of a population of one million or more or in a city in a county adjoining such a city, occupied for dwelling purposes, except a proceeding to recover such possession upon the ground that the person is holding over and is objectionable, in which case the landlord shall establish to the satisfaction of the court, that the person holding over is objectionable; or a proceeding where the owner of record of the building, being a natural person, seeks in good faith to recover possession of the same or a room or rooms therein for the immediate and personal occupancy by himself and his family as a dwelling; or proceeding where the petitioner shows to the satisfaction of the court that he desires in good faith to recover premises for the purpose of demolishing the same with the intention of constructing a new building, plans for which new building shall have been duly filed and approved by the proper authority; or a proceeding to recover premises constituting a part of a building and land which has been in good faith sold to a corporation formed under a co-operative ownership plan whereof the entire stock shall be held by the stockholders in proportion to the number of rooms occupied or to be occupied by them in such building and all apartments or flats therein have been leased to stockholders of such corporation for their own personal

exclusive and permanent occupancy, to begin immediately upon the termination of any tenancy of the apartments or flats leased by them, existing on the date when this subdivision takes effect.

"In a pending proceeding for the recovery of real property in such a city on the ground that the occupant holds over after the expiration of his term, a warrant shall not be issued unless the petitioner establishes to the satisfaction of the court that the proceeding is one mentioned in the exceptions enumerated in this subdivision.

"This subdivision shall not apply to a new building in course of construction at the time this subdivision takes effect or commenced thereafter and be in effect only until the first day of November, nineteen hundred and twenty-two."

The Joint Legislative Committee which also recommended the enactment of this Statute appended thereto an explanatory note stating the object of the exceptions, and stating generally as follows:

"This bill will do away with the anxiety of many people in New York who are now holding their premises under short stays or have been served with notices to move on October 1st. The notices served on people that they will be required to vacate on October 1st will be wholly ineffectual after the passage of this bill. In hold-over proceedings already brought, where a stay has already been granted, the court cannot issue a warrant to put the tenant out unless it is for one of the causes enumerated above."

Concededly the dispossess proceeding did not fall within any of the exceptions noted in the statute. Counsel for the respondent contends that the proceeding was terminated by the final order of the Court directing that a warrant to dispossess the tenant should issue and that, therefore, it was not a pending proceeding when the statute was enacted; and they also claim that if the statute

requires a construction embracing a proceeding in which such a final order had been granted,—then it is in that respect unconstitutional and void and that the relator was in either event entitled to the writ.

Neither of the two points presented has been authoritatively decided. I am of the opinion that it is perfectly clear that the Legislature intended that after the enactment of the statute no warrants should be issued in a dispossess proceeding not excepted therefrom, until the first day of November, 1922, at which time it is evident the Legislature expected the public emergency would terminate. It will be seen that the Legislature withdrew the summary remedy theretofore given for the recovery of the possession of any real property occupied for dwelling purposes with the exceptions which are not material to this appeal. Having forbidden the maintenance of such a proceeding, it also expressly forbade the issuance of a dispossess warrant in any pending proceeding for the recovery of real property on the ground that the occupant was holding over after the expiration of his term, unless the petitioner established to the satisfaction of the court that the proceeding came within one of the exceptions enumerated.

One of the objects of the Legislature would be frustrated if any further dispossess warrants were issued. If there were any doubt arising on the phrascology of the statute with respect to the intent of the Legislature in this regard, it would be removed by the note of the Joint Legislative Committee which accompanied the draft of the bill and referred to stays granted under Section 3 of Chapter 137 of the Laws of 1920, which authorized the granting of a stay of the issuance of a war-

rant under the final order for a period deemed proper, but not more than twelve months upon conditions specified in the statute. (*Caminetti* v. *U. S.*, 242 U. S. 470-490; *U. S.* v. *St. Paul M. & M. Ry. Co.*, 247 U. S. 310-318; *Fambarille* v. *Atlantic, &c. Co.*, 155 App. Div. 832-840, aff'd 213 N. Y. 666.)

The opinion of the learned Court at Special Term shows that the writ was granted on the theory that the summary proceeding was not pending, and he cited as authority for that ruling *Porter* v. *Kingsbury*, 77 N. Y. 164, wherein it was held that a plea of the pendency of a former action involving the same issues, which is authorized to avoid vexatious litigation, was not sustained by proof that the complaint in a former action by the plaintiff against the defendant had been dismissed for the failure to serve a notice required to be served before the action could be maintained, and that the judgment had become final owing to the failure of the plaintiff to appeal therefrom, but that the costs awarded thereby had not been paid. The plaintiff in that case, recognizing that his cause of action was not complete when he brought the first action, served the requisite notice and brought the second action in which this plea was interposed. The court in overruling the plea of the pendency of the former action held that if the judgment in the former action was a bar, it should have been pleaded as such, but that the action was terminated by the judgment and was "no longer pending within the meaning of this plea."

In *Wegman* v. *Childs*, 41 N. Y. 159, however, the Court held that an action prosecuted to final judgment which remained unsatisfied was "pending" within the meaning of Article XIV, Section 5, of the Constitution of

1846, which transferred the jurisdiction of the Court of Common Pleas to the Supreme Court and provided that all proceedings "then pending" in the Court of Common Pleas should become vested in the Supreme Court, and that an execution issued out of, and supplementary proceedings instituted in, and a receiver appointed by the Supreme Court under a final judgment in the Court of Common Pleas were authorized. That decision, although distinguished in *Porter* v. *Kingsbury*, *(supra)* was cited with approval in *Mulstein Company* v. *City of New York* (213 N. Y. 308-314), wherein it was held that the issuing of an execution and proceedings supplementary thereto are proceedings in the action. These and other authorities cited merely give effect in construing statutes and constitutional provisions to the intent of the law-makers, which here, I think, is plain. The relator, therefore, was not entitled to the writ under the statute and may not have it unless the statute is unconstitutional.

The jurisdiction of the Municipal Court is statutory and not preserved by the Constitution, and it is, therefore, competent for the Legislature to withdraw its jurisdiction with respect to summary proceedings or to modify it at will.

At the time the summary proceeding in question was instituted the Legislature had, by said Chapter 137 of the Laws of 1920, which took effect on the 1st day of April, 1920, authorized a stay of the issuance of the dispossess warrant in certain cases. That was the status of the jurisdiction of that court when the relator by petitioning it, instituted the summary proceeding; and pursuant to the statute, the court had stayed the warrant

until October 1st, before the Legislature by said Chapter 942 attempted further to suspend the issuance of the warrant until November 1st, 1922, as has been seen. Chapter 942, enacted at the Extraordinary Session, amended Section 2231 of the Code of Civil Procedure by adding subdivision 1-a, relating to cities having a population of one million or more and cities in a county adjoining forbidding, on the ground of a public emergency, the maintenance of summary proceedings under subdivision 1 of the section excepting with respect to objectionable tenants holding over and where the owner desired the property of his own immediate use, or possession was sought in good faith for the purpose of demolishing the building and constructing a new building and where the premises had been sold to a corporation formed under a co-operative ownership plan for personal occupancy by the stockholders. That amendment also forbids the issuance of a warrant in a pending dispossess proceeding based on the tenant's holding over without proof that the proceeding was within one of the four specified exceptions, and it was provided that it should not apply to a new building in the course of construction or thereafter constructed, and that it should remain in effect until November 1, 1922. By the note of the Joint Legislative Committee recommending this chapter, it is stated that it will be a relief of the anxiety of those holding over under short stays who have been served with notices to move on October 1st, and that such notice will be ineffectual and that it forbids the issuance of warrants in hold-over proceedings where a stay has been granted unless the proceeding falls within one of the exceptions. That this was intended as a

statutory stay without further judicial action is evidenced from the fact that by Chapter 948 enacted on the same day, Chapter 137, which theretofore authorized stays, as already stated, was amended, so as to exclude New York City and its operations were confined by phraseology embracing only Buffalo and Rochester. In a like note to Chapter 948, it is stated that the reason that the City of New York was excepted from the statutory provisions authorizing the court to grant a stay was that said Chapter 942 was deemed sufficient to cover hold-over proceedings in New York City and in cities in counties adjoining. It is contended by the respondent that the relator had a vested right to the issuance of the warrant on the 1st of October, which it was not competent for the Legislature thus to suspend.

It will be borne in mind that the relator in thus invoking the aid of the Municipal Court took the risk of the issuance of a warrant being stayed for a year but that authority was withdrawn as I have stated. It is well settled that vested property rights under a final judgment or determination in the nature of a judgment cannot be affected by subsequent legislation (*Gilman* v. *Tucker*, 128 N. Y. 190; *People ex rel. Reynolds* v. *Common Council*, 140 N. Y. 300; *Livingston* v. *Livingston*, 173 N. Y. 377; *Germania Savings Bank* v. *Suspension Bridge*, 159 N. Y. 368). The decision of the issue in favor of the relator and the granting of the final order constituted a judgment on the issues which, by failure to appeal therefrom, has become final, and of that unquestionably it was not competent for the Legislature to deprive the relator (*Reich* v. *Cochran*, 151 N. Y. 122; *Reich* v. *Cochran*, 105 App. Div. 542; *People* v. *Kelsey*, 14 Abbott's

Practice 378; *Altschuler* v. *Lipschitz*, 113 N. Y. S. 1058; *Dyckman* v. *Mayor*, 5 N. Y. 434).

By thus withdrawing from the court which had granted the stay until October 1st, authority to continue it further, the tenant's rights under the stay granted by the court terminated on October 1st, and he had no further right unless the attempted legislative stay was valid, for the only other authority for a stay is in the provisions of Chapter 210 of the Laws of 1929, authorizing the Municipal Court, among other things, to grant a stay of the execution of a final order in a summary proceeding for not more than thirty days, but that was not invoked and if it had been, it would have been inapplicable since the authority thereby conferred relates only to an original stay. I am of opinion, therefore, that the landlord, prior to the enactment of Chapter 942, had acquired a vested right to have a warrant issued under a final order on October 1st and that this was a property right of which he could not be deprived by the act of the Legislature (*Gilman* v. *Tucker*, *supra*; *Livingston* v. *Livingston*, *supra*.) It is claimed, however, that the statute may be sustained on the theory that it is merely a temporary suspension of the right of the landlord under the final order and that it was authorized by the public emergency. Respondent relies in support of this contention upon *Edmonson* v. *Ferguson* (11 Missouri 221) where a state statute suspending actions and proceedings against volunteers while absent from the state during the War of the Rebellion was sustained as valid, and in *Breitenbach* v. *Bush* (44 Pa. St. 331) sustaining the validity of a state statute staying civil process against any person in the service of the state or of the United

States during the War of the Rebellion for the term of such service and for thirty days thereafter. The decisions in those cases might well have been sustained on the ground that the statutes were enacted to enable the defendant in the service of his state or country to have his day in court; and insofar as the opinions go upon the theory that there was a well recognized distinction between the obligations of a contract and the remedies afforded for the enforcement of its obligations they are not in harmony with the decisions of the Federal Court which have been cited in *Levy Leasing Co.* v. *Siegel*, which was argued and is to be decided herewith, and they need not be further discussed here. In *Breitenbach* v. *Bush*, *supra*, however, the court stated that where the parties contract concerning a remedy, the remedy becomes a part of the obligation and may not be affected by subsequent legislation. In the case of lessees, there is a contract either express or implied that the tenant will surrender possession to the landlord, at the expiration or termination of his term, and the statute extending his term, as does the statute now under consideration, constitutes, if not an impairment of a remedy provided for in the contract, at least, an impairment of the obligations of the contract. *Hoffman* v. *Charleston Five Cts. Savings Bank* (231 Mass. 224), sustaining the constitutionality of the Soldiers' and Sailors' Civil Relief Act (United States Statutes, 1918, c. 20), which provided for a stay of proceedings in certain cases where the defendant was in the military service is also cited in support of the contentions of the respondent, but I find nothing in the opinion bearing materially on the point here presented for decision.

If Chapter 947 withdrawing the remedy by ejectment be held to be unconstitutional and void, it would seem to follow that it was incompetent for the Legislature by this statutory stay to deprive the owner of the possession of his property and secure possession to the tenant, whose term had expired, for the period of the statutory stay. However, since the rent cases were argued before this court and we had determined how we would decide them and our opinions had been formulated, our attention has been drawn to a decision of the Appellate Division in the Second Department in *People ex rel. Rayland Realty Co.* v. *Fagan* (New York Law Journal, December 9th, 1920), in which that court by a divided vote sustained the statute here involved as valid with respect to cases in which final orders had been made before its enactment. With all due deference to the opinions of the learned Justices who wrote in favor of the validity of the statute, we still adhere to our own views; but since that decision and ours are soon to be reviewed by the Court of Appeals, in order that there may not be a different rule with respect to the remedies under the same statute in different parts of the same city, we will follow that decision and reverse the order and deny the motion, but without costs.

Clarke, P. J., Dowling and Greenbaum, J. J. concur.

Merrell, J. concurs in result.

SUPREME COURT, APPELLATE DIVISION.—FIRST DEPARTMENT.

DECEMBER, 1920.

JOHN PROCTOR CLARKE, P. J.
FRANK C. LAUGHLIN,
VICTOR J. DOWLING,
EDGAR S. K. MERRELL,
SAMUEL GREENBAUM, JJ.

No. 5665.

PEOPLE ex rel. SYDNEY BALLIS,

Respondent,

v.

THOMAS O'DONNELL, Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District,

Appellant.

Appeal by the defendant from an order of the Special Term granting the relator's application for a peremptory writ of mandamus.

JOHN F. O'BRIEN, of counsel (HENRY J. SHIELDS and JAMES D. SULLIVAN with him on the brief), for Appellant.

J. SIDNEY BERNSTEIN, of counsel, for Respondent.

WILLIAM D. GUTHRIE and JULIUS HENRY COHEN, Special Deputy Attorneys-General, for the Attorney General.

ELMER G. SAMMIS and BERNARD HERSHKOPF, of counsel for the Joint Legislative Committee on Housing as *Amici curiæ*.

DAVID L. PODELL, as *amicus curiæ*.

LAUGHLIN, J.:—The relator on his own affidavit and on the affidavit of a City Marshal obtained an order to show cause, on which the motion was heard. The affidavit of the relator states that he is the owner of prem-

ises known as 47-49 Morton Street, Borough of Manhattan; that in July, 1920, a portion of said premises were in the possession of one Edward Lang, to whom he had previously rented them for the period of one month, which term had expired; that in July, 1920, he instituted a proceeding in the Municipal Court, First District of Manhattan, praying for a final order awarding him the possession of said premises, and for a warrant to remove the said tenant; that the tenant appeared, answered and the proceeding came on for trial; that on the said trial a stipulation was entered into whereby it was consented between the parties that a final order be made and entered awarding to him the possession of the premises, and that a stay of the execution of the warrant be had until October 1st, 1920, the tenant in the meantime paying the same rate of rent; that such order was entered on July 22, 1920, and that no appeal was taken therefrom; that no other stay has been granted; that on October 1, 1920, a City Marshal, acting under his direction, applied to the Clerk for a warrant under such final order, but the clerk refused to sign, issue or deliver the warrant and still refuses so to do; that he seeks to obtain possession of the premises in order to alter and improve them in accordance with plans duly filed for which contracts have been let; that the tenant is still in possession of said premises, and that he is sustaining financial loss through the refusal of the clerk to issue the warrant. His affidavit is supported by that of the City Marshal.

The Court directed that a peremptory writ of mandamus issue requiring the appellant as such Clerk of the Municipal Court to sign, deliver and issue to the Marshal a dispossess warrant as provided in the final order.

The dispossess proceeding to which the application herein relates was instituted in July, 1920, to recover possession of premises on the ground that the tenant was holding over after the expiration of the term without the consent of the landlord.

The only material difference between this proceeding and *People ex rel. H. D. H. Realty Corporation* v. *Murphy as Clerk*, is that here the final order was entered on a stipulation in open court made after issue was joined on the petition and answer and without a trial and decision on the issues by the Court and the same stipulation provided that the issuance of the dispossess warrant should be stayed until October 1, 1920.

Counsel for the respondent here makes the same contentions as were made by counsel for the respondent in the other madamus proceeding. He, however, further contends that the stipulation constitutes a contract by which the tenant agreed in effect, to waive the benefit of the provisions of said Chapter 137 of the Laws of 1920, which had not then been amended by excepting New York City therefrom, authorizing the Court to grant a stay of the dispossess warrant, and that at the expiration of the stipulated stay the dispossess warrant might be issued. There is force in the contention that this constitutes a contract with respect to the remedy, of which the landlord could not be deprived by a subsequent act of the Legislature, even though it had power so to stay the remedy where there is no contract with respect to the remedy. (See *Breitenbach* v. *Bush*, 44 Pa. 331.) It is, however, unnecessary to decide the point, for as stated in the opinion in the other similar proceeding we would grant the writ in any event were it not for the decision

made by the Second Department, to which reference is made in that opinion. We will, however, for the reasons stated in the other opinion follow that decision and reverse the order and deny the motion, but without costs.

Clarke, P. J., Dowling and Greenbaum, JJ., concur.

Merrell, J., concurs in result.

SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT.

DECEMBER, 1920.

JOHN PROCTOR CLARKE, P. J.
FRANK C. LAUGHLIN,
VICTOR J. DOWLING,
EDGAR S. K. MERRELL,
SAMUEL GREENBAUM, JJ.

No. 5790.

THE PEOPLE EX REL. BRIXTON OPERATING CORPORATION,
Relator,

vs.

EDWARD B. LAFETRA, a Justice of the City Court of the City of New York,
Respondent.

Appeal by relator from an order of the Special Term denying its motion for a peremptory writ of mandamus.

GEORGE L. INGRAHAM, of counsel (JOHN M. STODDARD with him on the brief), for Appellant.

JOHN F. O'BRIEN, of counsel (RUSSELL LORD TARBOX with him on the brief), for Respondent.

ROBERT P. BEYER, Deputy Attorney-General, WILLIAM D. GUTHRIE and JULIUS HENRY COHEN, Special Deputy Attorneys-General for the Attorney-General and ELMER G. SAMMIS and BERNARD HERSHKOPF for the Joint Legislative Committee of Housing, as *amici curiae*.

LAUGHLIN, J.—Appellant owns the apartment house known as 120 West 70th Street, Borough of Manhattan, City of New York, and on the 14th of April, 1917, it leased an apartment therein to a tenant for a term commencing October 1, 1917, and ending on the 30th of September,

1920, by a lease in writing in and by which the tenant covenanted that at the expiration of the term he would quit and surrender the premises. At the expiration of the term, the tenant refused to vacate and the appellant duly applied to the defendant, who is a Justice of the City Court, by petition, pursuant to the provisions of Sections 2234 and 2235 of the Code of Civil Procedure, for the institution of a summary proceeding for the removal of the tenant under subdivision one of Section 2231 of said Code. Defendant refused to entertain the application on the ground that the proposed proceeding was not authorized by the provisions of Chapter 942 of the Laws of 1920, which forbids the institution of such proceeding excepting in certain cases therein specified, and that the petition did not bring appellant's application within one of the exceptions. The provisions of said Chapter are considered in our opinion in *People ex rel. H. D. H. Realty Co.* vs. *Murphy, as Clerk, etc.*, to be decided herewith, and need not be restated. It is sufficient to say that the Legislature, excepting in specified cases of which this is not one, thereby, for the period specified in the act, withdrew from all courts jurisdiction over and from all suitors, the remedy to remove a tenant and to recover possession of real property by summary proceedings. Appellant contends that inasmuch as the remedy by summary proceedings was given when the lease was made, it was not competent for the Legislature to withdraw it as to existing contracts. In *People ex rel. H. D. H. Realty Co.* vs. *Murphy, as Clerk, etc., supra*, we are expressing the opinion that the Legislature could withdraw or modify this remedy at will, provided it left another adequate remedy for recovering the possession

of the property. The learned counsel for the appellant argues the point somewhat more at length than it was argued in the other case and cites additional authorities, but he cites none which we regard as entitling a party to a contract to *the precise remedy* for its violation or enforcement that was afforded at the time the contract was made, and we understand the rule now to be that a *statutory* remedy may be modified or withdrawn, and that any remedy may be modified or changed so long as rights secured by contracts are not substantially impaired and some adequate remedy remains (*Van Rensellaer* vs. *Snyder*, 13 N. Y. 299; *Conkey* vs. *Hart*, 14 N. Y. 22; *Guild* vs. *Rogers*, 8 Barb. 502; *Stocking* vs. *Hunt*, 3 Denio 274; *Edward* vs. *Kerzey*, 128 N. Y. 190; *Gilman* vs. *Tucker*, 128 N. Y. 190; *Laird* vs. *Carton*, 196 N. Y. 169; *Lazarus* vs. *Metropolitan Elevated Railway*, 145 N. Y. 581; *Story* vs. *Furman*, 25 N. Y. 214; *Fourth Nat'l Bank* vs. *Franklyn*, 120 U. S. 747; *Pittsburg Steel Co.* vs. *Baltimore Eq. Soc.*, 226 U. S. 455; *McGahey* vs. *Virginia*, 135 U. S. 662; *Hanley* vs. *Meyers*, 215 U. S. 373; *Cooley on Constitutional Limitations*, 411; see also *Southwick* vs. *Southwick*, 49 N. Y. 510). The authority, however, of the Legislature to change the remedy does not authorize the substitution of a remedy by which a party may not recover what he was entitled to recover under the contract and the laws existing when it was made. This is well illustrated by *McCracken* vs. *Hayward*, 43 U. S. 607. There the law at the time of the making of a contract and of recovery of a judgment thereon authorized a sale of real or personal property levied on under an execution thereon regardless of the amount bid therefor. Thereafter the law was changed by retroactive legislation for-

bidding a sale under such a levy unless a bid for two-thirds of the value of the property as ascertained by the officer making the levy was made. The court held that the plaintiff was entitled to a sale of the property for what it would bring on the ground that he acquired that right under the law existing when the contract was made, and that if the amended law was sustained as to him, he might be deprived altogether of having his claim paid. In so deciding the court said:

> "In placing the obligation of contracts under the protection of the Constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution; annulling all state legislation which impaired the obligation, it was left to the states to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

* * * * * *

"The obligation of the contract between the parties in this case was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in stipulations in the very words of the law relating to judgments and executions. If the defendant had made such an agreement as to authorize a sale of his property, which should be levied upon by the sheriff, for such price as should be bid for it at a fair public sale on reasonable notice, it would have conferred a right on the plaintiff, which the Constitution made inviolable; and it can make no difference whether such right is conferred by the terms or law of the contract. Any subsequent law which denies, obstructs or impairs this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement, or any other mode of valuation than a public sale, affects the obligation of the contract, as much in the one case, as the other, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right. The same power in a state legislature may be carried to any extent, if it exists at all; it may prohibit a sale for less than the whole appraised value, or for three-fourths, or nine-tenths, as well as for two-thirds, for if the power can be exercised to any extent, its exercise must be a matter of uncontrollable discretion, in passing laws relating to the remedy which are regardless of the effect on the right of the plaintiff. * * *"

Although broad language was there used, which might indicate that a party was entitled to the particular remedy existing at the time of contracting, it must be read

in the light of the prior admission in the opinion that it was left to the states to prescribe and shape the remedy. That opinion and like doctrine in other cases have not been regarded as limiting the authority of the Legislature with respect to changing statutory remedies; and in respect to such remedies, at least, the general rule is that contracts are deemed to have been made subject to legislation changing the remedy for the enforcement thereof. (*Van Rensellaer* vs. *Snyder, supra; Conkey* vs. *Hart*, 14 N. Y. 22; *Guild* vs. *Rogers*, 8 Barb. 502; *Stocking* vs. *Hunt, supra; Laird* vs. *Carton, supra*). In *Conkey* vs. *Hart, supra*, the statute abolishing distress for rent was again sustained as applicable to existing leases, and it was held that although it was provided in the lease that the landlord should have the remedy then existing to seize for distress in the event of the non-payment of rent, still it was competent for the Legislature to withdraw that remedy, and that it did not impair the obligation of the contract since the landlord has a remedy by action for the rent. In *Van Rensselaer* vs. *Snyder, supra*, which was decided long after *McCracken* vs. *Howard, supra*, a statute abolishing distress for rent and affording the landlord a remedy by ejectment for regaining possession of his property was sustained as a valid substitution of remedies under leases theretofore made. There a remedy by distress for the payment of the rent was reserved by the express terms of the lease, and that remedy was taken away, and instead thereof a new statutory remedy in the nature of ejectment to enable the landlord to regain possession of the property for failure to pay rent was afforded. The Court held that the statute rendered the performance of the stipulated condition, by

which the rent was to be satisfied by distress, impossible, but that this did not constitute an unauthorized change in the contract, and that the tenant's right to have the rent paid by distress instead of having his estate terminated was subject to a legislative change of the remedy by which, in case of non-payment of rent, a statutory right of re-entry was conferred upon the landlord.

In *Laird* vs. *Carton, supra*, a statute authorizing an execution against wages was sustained as applicable to judgments obtained before its enactment, although at the time the contract was made and the judgment recovered, no such liability to have execution issued against one's unpaid and unearned wages existed.

The point that no adequate remedy remains will be met by our decision in *Guttag* vs. *Shatzkin* to be decided herewith, wherein we are deciding that the remedy by ejectment remains. The claim that taking away this remedy deprives the plaintiff of the equal protection of the laws is also answered by that decision, which leaves open to all the remedy by ejectment. An action in ejectment will afford the plaintiff a complete adequate remedy for regaining possession of its property. The only respect in which it differs from a summary proceeding is that the latter is a more summary and ordinarily a more speedy remedy, but that difference is not sufficient to warrant a court in holding that a withdrawal of the remedy by summary proceedings unlawfully impairs the value of the contract. It may be and doubtless was the intention of the Legislature to delay landlords in obtaining possession of their property, and this is evident from the fact that on the same day this statute was enacted, it attempted to withdraw the right for the period speci-

fied to maintain an action of ejectment, but that was deemed necessary to meet the emergency and was not the primary object of the Legislature for, as stated in our opinion in *Levy Leasing Co.* vs. *Siegel*, to be decided herewith, an emergency existed which warranted the Legislature in exercising all of its police powers. In the circumstances, I think in view of the rule that a statute may not be declared void unless there can be no reasonable doubt that it is unconstitutional, the court would not be warranted in annulling this act of the Legislature merely on the ground that thereby the plaintiff was relegated to an adequate but less summary and speedy and somewhat more expensive remedy than was afforded by law when the contract was made. The remedy was withdrawn before the plaintiff's right to possession accrued, and I think he was then required to pursue his remedy by ejectment.

It follows that the order should be affirmed with $10 costs and disbursements.

ALL CONCUR.

SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT.

DECEMBER, 1920.

JOHN PROCTOR CLARKE, P. J.
FRANK C. LAUGHLIN,
VICTOR J. DOWLING,
EDGAR S. K. MERRELL,
SAMUEL GREENBAUM, *JJ.*

No. 5789.

THE PEOPLE ex rel. DURHAM REALTY CORPORATION,
Relator-Appellant,

vs.

EDWARD B. LAFFERTY, *a Justice of the City Court of the City of New York,*
Defendant-Respondent.

Appeal by the relator from an order of the Special Term denying its motion for a peremptory writ of mandamus.

GEORGE L. INGRAHAM, of counsel (JOHN M. STOEPARD and ALEXANDER C. MCNULTY with him on the brief), for Appellant.

ROBERT P. BEYER, Deputy Attorney-General, for Respondent.

WILLIAM D. GUTHRIE and JULIUS HENRY COHEN, Special Deputy Attorneys-General, for the Attorney General.

ELMER G. SAMMIS and BERNARD HERSHKOFF, for the Joint Legislative Committee on Housing, as *amici curiæ*.

LAUGHLIN, J.:—On the 20th day of October, 1920, the relator presented a petition in due form to the City Court showing that it was the owner of an apartment house known as 490 West End Avenue, in the Borough

of Manhattan, New York; that on or about the 28th day of May, 1917, by a lease in writing it let to one Weil an apartment in said building for the term of three years ending September 30th, 1920; that the tenant was holding over after the expiration of the term without its permission; that the proceeding was not one of those authorized or provided for in subdivision1-a of Section 2231 of the Code of Civil Procedure, as amended by Chapter 942 of the Laws of 1920, and that it made a formal application in writing to said court for the issuance of a precept for the removal of the tenant, which was denied in writing by the defendant, who is a Justice of the said Court, on the ground that the issuance of the precept was not authorized by the statute. The motion was for a mandamus requiring the issuance of a precept. Mandamus in such case is the appropriate remedy (*People ex rel. Lewis* v. *Fowler*, 229 N. Y. 84). The contentions here made with respect to the invalidity of the statute withdrawing the remedy of summary proceeding and of the right of the relator to the remedy as it existed when the contract was made are answered by the opinion in *People ex rel. Brixton Operating Corporation* v. *LaFetra*, as Justice etc., argued, and to be decided herewith.

The applicant, however, makes a further point that said Chapter 942 withdrawing the summary proceeding remedy with respect to tenants holding over after the expiration of their term, with certain exceptions not here in point, was not passed in the manner provided by Article III, Section 15, of the Constitution, which provides as follows:

> "No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members in its final form at least three cal-

> endar legislative days prior to its final passage, unless the Governor or the Acting Governor shall have certified to the necessity of its immediate passage under his hand and the Seal of the State."

Concededly the bill was not printed and upon the desks of the members in its final form three calendar legislative days prior to its final passage. It is claimed that the Governor did not duly certify to the necessity of its immediate passage so as to warrant its passage without its having been so printed and upon the desks of the members. Its authenticity was duly certified by the presiding officer of each house, and it was signed by the Governor, and appears in the official edition of the laws.

The appellant in support of this claim did not rely on the bill itself and the official certification thereof and official journals of the two houses but attempted by affidavits to impeach the official journals.

Chapter 942 originated in the Senate where it was introduced on the 20th of September and became known as Senate Bill No. 25 and as printed, was given the introductory number 25 and the printed number 25. It was originally intended to apply to all cities of the first class and to cities in a county adjoining and the title of the bill so provided, and was designed to repeal Chapter 137 of the Laws of 1920 which applied to the same cities. The bill was evidently referred to the Committee of Affairs of Cities. The journal of the Senate shows that on the 24th of September that committee was discharged from further consideration of the bill; that the rules were suspended and the bill was ordered to a third reading; that when it was reached on the order of third reading, it was recommitted to the committee with instructions to amend and report it forthwith to be re-

printed as amended and restored to its place on the order of third reading, and that the amendment related to the title, which was changed so as to limit it to cities of a population of one million or more and cities in a county adjoining such a city. The effect of that was to except from the bill the cities of Buffalo and Rochester. The Senate Journal further shows that the committee reported the bill amended as directed and that it was ordered reprinted and placed on the order of third reading; that a message from the Governor addressed "To the Legislature" in the form prescribed by said provisions of the Constitution, was then received at the hands of his secretary and read and incorporated in the Journal; that the Governor's message recited that, it appearing to his satisfaction that the public interest required it, he certified "to the necessity of the immediate passage of Senate Bill, Introductory No. 25, printed No. 25" and he quoted the title of the bill as originally introduced followed by the words "as amended." The bill as so amended evidently was then passed by the Senate, for its journal shows that it was returned by the Assembly with a message to the effect that it was concurred in by the Assembly with two amendments set forth in full, the effect of which was to require the petitioner who desired possession for his personal use to show that such desire was in good faith, and to extend the bill, in so far as it authorized landlords to regain possession of their property, to a proceeding to recover possession where the building had been sold in good faith to a co-operative ownership corporation and was to be occupied personally by the stockholders. The Journal of the Assembly shows that the bill was received from the Senate for con-

currence, and the title of the bill as so amended is set forth and the numbers by which it had then come to be known, namely, 60A, reprint No. 68-Rec. No. 21; that it then had a first reading in the Assembly and was amended as already stated, and was then read a second time and ordered to a third reading; that thereupon, a message from the Governor, in due form as required by these provisions of the Constitution, addressed "To the Legislature," was received, reciting that, it appearing to his satisfaction that the public interest required it, he thereby certified to the necessity of the immediate passage of "Senate Bill, Introductory No. 25, print 25A, reprint 68," but quoted the original title of the bill; that the bill as thus amended by the Assembly thereupon had its third reading and was duly passed. Although the message of the Governor quoted the original title of the bill, it is perfectly plain from the specification in the message that it related to the bill bearing the reprint number 68, that the message referred to the bill as amended by the Senate and as it was then pending in the Assembly. It further appears by the Journal of the Assembly that the Speaker, on putting the question whether the House would agree to the final passage of the bill, stated that the necessity for its immediate passage had been certified by the Governor, and that after its final passage it was ordered returned to the Senate with a message that the Assembly had concurred in its passage with said amendments, and that thereafter the Assembly received the bill from the Senate entitled "No. 60 A, reprint 68-Rec. No. 21," giving the title as originally amended in the Senate, which was merely a notification to the Assembly that the Senate had concurred, for the

bill was thereupon ordered returned to the Senate. It further appears from the Journal of the Senate that the Senate, on receipt of the bill from the Assembly with said amendments the first time, duly concurred therein, and that thereupon another message was received from the Governor in due form under the Constitution, addressed "To the Legislature," which recited that, it appearing to his satisfaction that the public interest required it, he certified "to the necessity of the immediate passage of Senate Bill, Int. No. 25, print No. 60, Assembly reprint No. 68," giving the title as amended by the Senate, confining it to cities having a population of one million or more and cities in a county adjoining, and that thereupon the bill, as so amended by the Assembly, had its third reading and was put on final passage by the President of the Senate who, in putting the question, stated that the Governor had certified to the necessity of the immediate passage of the bill, and it was thereupon passed. It thus appears that the Journal of each house shows that the members thereof understood that the Governor was certifying to the necessity of the immediate passage of the bill in its amended form, and that he so intended is evidenced by his reference to the Assembly reprint of the bill, which included the amendments and evidently was the final reprint showing the bill in the precise form in which it was enacted, and by his approval thereof. At most, there was an error in the original message with respect to the description of the title of the bill as it was then before the Senate, but that the Governor must have understood that the title had been amended is shown by his designation of it by a number which identified the bill as it then

existed. In addition to this record evidence, conflicting affidavits were presented with respect to the number of messages sent to the Legislature by the Governor concerning this bill, and with respect to the action of the Senate and Assembly on the bill before and after the receipt of such messages. On the part of the appellant, these affidavits tend to impeach the records to which reference has been made, and the affidavits on the part of the respondent support the records and plainly show that the bill was duly passed. In referring to this evidence *dehors* the record, we do not wish to be understood as indicating an opinion that a statute may be impeached by such evidence. The general rule is that it is not even competent to examine the official records of the legislative bodies in passing upon the validity of a statute (*Hunt* v. *VanAlstyne*, 25 Wend. 605; *Field* v. *Clark*, 143 U. S. 649; *Ritchie* v. *Richards*, 14 Utah, 345; *People ex rel. Purdy* v. *Commissioners of Highways of Marlborough*, 54 N. Y. 276; *McCullough* v. *State*, 11 Ind. 424; *Miller* v. *State*, 3 Ohio Rep. 475); but where the validity of a statute depends upon a particular thing being shown or not shown by the official journals, it is proper to examine them (*Hopkell* v. *Brethaus*, 7 Ill. 166; *Wilkes County Commissioners* v. *Koehler*, 180 U. S. 506; *Bank* v. *Commissioners*, 119 N. C. 214; *People* v. *Petrea*, 92 N. Y. 128; see also *Kittinger* v. *Buffalo Traction Co.*, 160 N. Y. 377). Our attention has not been drawn to any statute requiring that the certification of the passage of a bill shall show whether or not it was printed and on the desks of the members in its final form for the requisite period before it was passed, or whether that requirement was dispensed with by an

emergency message from the Governor. It may well be that such certification, if required to be made by the presiding officers of the respective houses, could not be impeached even by the official records; but if there be no such requirement, the mere fact that the Secretary of State has certified that the statute was duly enacted does not necessarily, I think, preclude an inquiry with respect to whether these constitutional provisions were complied with. The official journals may be consulted in support of a statute, but we are of opinion that in no event could parol evidence be received to impeach the official certification by the presiding officers or the journals of the respective houses, for that is not permitted even in jurisdictions where recourse may be had to the official journals (*Taylor* v. *Beckham*, 108 Ky. 278; *State ex rel. Herron* v. *Smith*, 44 Ohio St. 348; *McCullough* v. *State*, *supra*; *Eld* v. *Gorham*, 20 Conn. 8; *Wise* v. *Bigger*, 79 Va. 269; *People* v. *Hatch*, 33 Ill. 9).

The affidavits tending to impeach the official journals must therefore be excluded from consideration. We do not deem it necessary to examine the statutes, which are not cited, with respect to the certification of the passage of laws, or to decide whether the official journals may be consulted on this point to annul an enactment, for in the case at bar those journals do not tend to show a noncompliance with the provisions of the Constitution. It will be observed that the Constitution does not prescribe how the bill shall be identified in the emergency certificate, or that the message shall be spread upon the journals of the House and the Senate, or that a duplicate shall be delivered to each house. If these constitutional

provisions required a construction that the Legislature was limited to the passage of the bill in the precise form in which it was at the moment it received the emergency message from the Governor, that is sufficiently shown here by the official journals; but I think that would be too narrow a construction to place on the Constitution, and that, at least, amendments not materially affecting the purpose and object of the bill may be made after the receipt of the message from the Governor. It is manifest that the subsequent approval of the bill by the Governor is entitled to great weight as showing that the bill as it came to him is the bill the immediate passage of which he deemed required by the public interest. The requirement of the emergency message is to dispense with and obviate the delay otherwise required to prevent hasty legislation. It appears that this constitutional amendment as originally proposed did not contain the words requiring that the bills should be upon the desks of the members "in its final form", and that they were added by amendment (Constitutional Convention, 1914, Vol. 1, p. 887). It will be observed that the constitutional provisions with reference to the emergency message are directed to the *bill*, and that the provisions of the Constitution recognize a distinction between the *bill* and the *bill in its final form*. It is regarded as the same bill from the time of its introduction until it passes. If it were held that there could be no change in the bill, even to correct a typographical error or to clarify its meaning, after the receipt of the Governor's message, the validity of all such legislation would be endangered by an inquiry with respect to the time of the receipt of

the message and the precise form of the bill at that time. If that were intended, the Constitution would have required that a record of those matters should be made and preserved, but it does not.

It follows that the order should be affirmed with $10. costs and disbursements.

All concur.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF INDIANA.

No. 347.

AMERICAN COAL MINING COMPANY,
Plaintiff,

vs.

THE SPECIAL COAL AND FOOD COMMISSION OF INDIANA, *et al.*,
Defendants.

BE IT REMEMBERED That on the 6th day of September, 1920, at the District Court Room, in the City of Indianapolis, Indiana, the above entitled cause came on for hearing before the Honorable Francis E. Baker, and Honorable Evan A. Evans, Judges of the Circuit Court of Appeals of the United States for the Seventh Circuit, and the Honorable Ferdinand A. Geiger, Judge of the District Court of the United States, for the Eastern District of Wisconsin.

The Court having heard arguments of counsel on the motion for a preliminary injunction and on defendants' motion to dismiss the bill, and being fully advised, Judge Baker, for the Court, rendered the following opinion:

JUDGE BAKER, orally: Respecting the motion for a preliminary injunction, the Court is of opinion that certain parts of the bill do not present any emergency. Granting that the plaintiff has the right, under the Federal Constitution, to have its outstanding contracts protected from interference, it would be time enough to consider that question when an actual order is made by the Commission, the effect of the enforcement of which would be to impair such contracts. Until that time the question, in our judgment, is purely moot.

Similarly in regard to the question of interference with interstate commerce, no order has been made which directs this or any other mining company to do any specific thing. When some order may hereafter be made by the Commission, the plaintiff, instead of finding itself damaged, may possibly find itself benefited. If the Commission should direct the plaintiff to produce a maximum of a hundred thousand tons of coal for Indiana consumption, and the plaintiff should say, "We have already arranged for a larger Indiana consumption," certainly the plaintiff would not be injured by such an order. Or, if the Commission were to direct the plaintiff to dispose of a hundred thousand tons to Indiana consumers, at a price of two dollars and a half per ton, the plaintiff might very gratefully accept the order and say "We had expected to charge only two dollars and twenty-five cents a ton."

We will not indulge in any presumption that orders, when they come to be issued, will in fact cause or threaten to cause any material damage to the plaintiff.

The question of the license fees the Court would not deem a sufficient basis for the issuance of an injunction *pendente lite*, because, as far as our information of the Indiana law goes, the plaintiff would have an adequate remedy by paying under protest, and bringing an action for the recovery of the amount paid, with interest; and the Coal Commission Statute itself provides that none of the penalties shall be enforced while a civil question is being determined. Even if there should be a threat of enforcement of penal provisions, by reason of a refusal to obey some order of the Commission, it would be time enough then to appeal to a court of equity on the

ground that no adequate remedy at law existed, and that there was an impending, actual threat of invasion of rights.

There is involved, however, in this application for a preliminary injunction, the one foundational question of the right of the State to touch, at all, the coal mining business.

If no such right exists in the State, then the temporary injunction should be issued at once. And because there would be no questions of fact to controvert; a final decree in favor of the plaintiff should at once be entered, if there is a total lack of power in the State to create this commission, through which to undertake the control of coal mining.

Does such a power exist? Of course it is elementary that our Federal Government is one of enumerated, specially defined powers, and powers essential to the execution of those specifically granted, and that our State Governments are organized on the exact converse of that theory. The State has all the powers of an absolute, unrestrained sovereign, except so far as the State surrendered certain sovereign powers with which to constitute and create the Federal Government.

The legislature of the State is the agent of the people of the State in exercising the peoples' powers as an absolute sovereignty. The legislature is an absolutely free agent in exercising State powers except insofar as its principals, the people, have expressed a limitation in the State Constitution. For the purpose of this Federal inquiry it may be taken that the State legislature had the full power of the people of the State of Indiana and that

the people of Indiana stood as absolute sovereigns over the persons and properties within the limits of the State, except insofar as those powers of sovereignty had been surrendered to the Federal Government. Among the powers surrendered, of course, was the power over interstate and foreign commerce, treaty making, the war power, and others. But there remained to the people of Indiana, as absolute sovereigns, the whole of the police power over matters within the State. That means, the power of the people to determine upon measures for the public welfare, which may be expressed by the legislature without any limitation that is not imposed upon the State by the Federal constitution.

In this present inquiry concerning the right of the plaintiff to a preliminary injunction, the only Federal question presented is that which arises under the Fourteenth Amendment. The Fourteenth Amendment was adopted, according to my present memory, in 1868. In 1868 there was a certain circle within which a person had his life, his right to his physical being. Within that circle he had free movement, and it was not until he came to cross its periphery, that he collided either with his fellowmen or with the government as a social organism. And similarly in 1868 there existed circles which circumscribed a person's business and property rights.

Now, did the adoption of the Fourteenth Amendment mean that civilization was arrested at that date? Did it mean that the historian of the year 3000 would look back to the year 1868 as the time of the formation of a crystalized stratum of civilization in which, as in the geological stratum, he might find the footprints of the mega-

therium and the fossils of the dinosaurus? If that is true, then every attempt since 1868 to narrow the circle within which one was entitled to life has been in violation of the Federal Constitution. If that is so, then every statute which created and defined a new crime and provided a punishment for it was unconstitutional. If that is so, then every time a new condition was imposed by which liberty of contract was restricted, and this circle was diminished in its area, the statute creating the condition was unconstitutional. Property is coupled with life and liberty. It is, thereby, entitled to equal consideration, but certainly to no greater. And therefore a state legislature was just as free to limit the circle in which property rights stood as it was to diminish the circles in which life and liberty, freedom of contract, freedom of action, were circumscribed.

Of course all the cases that have upheld any sort of state legislation since 1868, that have in fact diminished one's condition with his fellows and with the State, have necessarily meant that this Fourteenth Amendment did not fix a date line at which civilization should be considered as stratified and embodied in a dead layer.

To my mind there are two classes of cases that illustrate the right of the State to exercise its police power. Over on the one side fall all of the cases in which there is a public franchise or a public service or a public utility. Over on that side belong, also, inn keepers along with the carriers, and to that class was added, in Munn against Illinois, the warehouse, which had been a private warehouse. In such cases the right to exercise the police power is based upon the fact that they either had a public

charter, exercising a public power, like that of eminent domain, or they were performing a public service.

But there are other cases in which none of these elements of a charter, or the power of eminent domain, or a public service, or a devotion of property to public use, appears.

How about the law in Indiana, back in 1881, that forbade a lightning rod expert to sell forty rods to a farmer and put them up on his barn and go in and get the farmer to persuade or coerce his wife into signing as surety? In that case there was no charter, no franchise, no eminent domain, no public service involved. It was purely an interference with the right of private contract, without the slightest excuse of the kind found over on the other side of the line. And what was the basis of it? The basis was the finding by the legislature that wrongs and oppressions were being inflicted upon the married women of this State through the persuasion or duress of husbands or sons, and that the condition was of such consequence to the State, as an organized society, that a stop should be put to it; and so the legislature passed the law that any contract of suretyship of a married woman should be void. That act was passed since 1868. If the adoption of the Fourteenth Amendment created a crystallized stratum, so that never thereafter could the right of contract be impaired, then that law was unconstitutional.

How about the laws, in this coal mining industry, relating to the furnishing of timbers and props, and cages, and ventilation, and the general taking away of the freedom of contract between the mine operators and

the miners with respect to the conditions under which they shall work? Under those laws it was not longer permissible for them to barter about what should be done with respect to the conditions in the mines. There was an absolute standard fixed, and the mine operator was absolutely prohibited from doing certain things. Why that law? Because of the dominance of the operator it was found by the legislature that the men needed protection. The same thing is the basis of all our inspection laws. All of these things that are controlled in that way may be inspected, and the cost of the inspection charged against that particular industry, just as the examination of banks is charged against the banking business.

Those are all familiar restrictions. Thousands of them could be cited, but they are all over on the other side, and there is a clear line dividing them from the cases that are based upon franchises and the exercise of eminent domain, the employment of streets for water and lighting and transportation purposes. These have no basis at all except upon the power of the people to restrict the theretofore existing circle in which a person had his life, and the one within which he had his liberty, and the one within which he had his property,—to bring these down narrower on account of conditions that were found to be oppressive to the people.

Over on this side, where the source of the power is the existence of a franchise, when the evil has been found to be that of exacting more than was fair to exact of the people, there has never been any question that the proper remedy was to say that "All you shall obtain shall be a fair return."

Now, what basis is there for any distinction in remedies? There is no distinction as to the source of power of regulation. It all comes from the police power. Dividing that into the two subject matters upon which the police power operates—the one based upon the public franchise or the like, and the other upon abuses of the theretofore existing right of private contract or private property—when in the one case you find that the evil to be cured is extortion and the remedy is price regulation, then in the other case when extortion is also found to be the evil you should apply the known remedy for extortion. The power is one; the evil is the same evil; and the remedy is drawn from the same reservoir, though from different faucets. There is no infringement of the right of a man to hold property, if, under the power of eminent domain, it is taken from him for a public use and the fair value of it is paid him. That is a constitutional thing, and there is no objection to it. So, when it comes to regulating the returns that he shall receive from his property that is not taking his property, it is simply a control of his property as an instrument in his hand, with which the legislature has found that he has been bludgeoning the people.

I remember very well reading ancient statutes about cutting off the ears of the wage earner and putting him in a pillory if he went from one parish to another without written consent, and about fixing the wages of the laborer, and fixing prices, back in the times of Elizabeth. Those statutes, though long ago repealed, demonstrate that in Anglo-Saxon institutions there was no lack of power to restrict the freedom of contract and to apply to the evil of extortion the remedy of price-fixing. But

there has been one statute that from the earliest times has stood over on this side of the line purely an interference with the right of contract, and regulating the price. Take the case of the lender making a loan to a man at usurious interest. Now, what is a loan? A loan is really a sale. Title passes at once. Money is a commodity. Bankers buy and sell money. Now, here is one line of business that never has depended, as a basis for control upon the power of eminent domain, or a public service. It is a private business. Nothing could be more private than the pawn broker's business, and yet, from time immemorial, it has been unquestioned that the power existed to regulate that business by fixing the prices for money. I am unable to distinguish the underlying principle in that case from this, or from the statutes regulating rentals. I know, from common knowledge, that the State of New York has had under consideration such a statute, and Wisconsin has passed a law regulating rentals under certain conditions and during certain times. That is, there was a finding by the people of Wisconsin, who were the absolute sovereigns in all respects over every person and every piece of property in that state—except to the extent that sovereignty had been surrendered to the Federal Government—through their agent, the legislature, that extortion was being practiced by landlords. The legislature was the unrestricted agent of the people; it had the full power of the people, just as much so as if the people got together in a new constitutional convention and found exactly the same quality of oppression that was exercised by the man who took advantage of the necessity of someone to get some cur-

rency for himself. Are the sovereign people helpless in such a situation? They certainly are if the Fourteenth Amendment stopped the narrowing of these various circles within which persons theretofore might move freely with respect to life, liberty and property. But otherwise, not. The police power is continuous. It has always existed, and necessarily must always exist. And it is as wide as any conceivable sovereignty can be. It is absolutely as wide—laying aside for the moment the part of the absolute sovereignty that has been made over to the Federal Government—as that of the Arab sheik, sitting out in front of his tent, controlling the actions of his tribal members.

Such is the power of the people of the state, provided they preserve a republican form of Government and do not otherwise infringe upon the Federal Constitution.

One of the powers that was surrendered by the State was the war power. But the State never surrendered a jot or tittle of the police power as affecting the affairs within the State. Of course, they surrendered their police power as involving war. That has gone to the Federal Government. The power over inter-state and foreign commerce has all gone to the Federal Government. With respect to internal affairs the power stands absolutely unchanged, unrestricted, in the State.

The Federal Government, being a government of listed, delegated powers, never had any general totality of sovereignty, as the States originally had. The Federal Government has no sovereignty except that which was cut off from the States and welded together to make what there is of the national sovereignty. The Federal Government has no general police power, but with respect

to war it is the successor of the State in police power—the power of the State to protect itself, the power to determine its own necessities, the power to protect the health and welfare and morals of its people. No dispute has ever arisen when health and morals were concerned. When you get down to welfare the question is frequently raised about financial considerations. And of course the State has a right to protect its people with respect to financial considerations. All of our Blue Sky Laws, and our married women surety laws, and our laws restricting the sale of patent rights, and our laws controlling fire insurance rates, and our exemption laws, are all financial questions, looking to the welfare of the citizens of the State, and ultimately, the welfare of the State, because the State has an interest in the welfare of all of its citizens and inhabitants.

The Federal Government, with respect to the war power, is simply the successor of a part of what was once the State police power. Therefore, the national power, with respect to war, is simply a piece off of the general power that belonged to the original States, which might have kept up, if they had chosen, each for itself, an absolute, full sovereignty.

Now, under that war power, which, in the national scheme of government, stands exactly analogous to the police power of the State, what has been done? Of course, the war power has been interpreted, and had to be interpreted, in view of the restrictions in the Federal Constitution, had to be construed with respect to what was reserved in the Federal Bill of Rights—the first ten amendments, and particularly the fifth amendment.

We have never thought, for a moment, that this war power authorized the Federal Government to go out and take a man's property without compensation. No. The Food Administration did not appropriate a man's property without due compensation. The Fuel Administration did not propose to take his coal away from him without due compensation. The Federal Government has this war power, originally the police power of the State, and it would have all been in our State, fully and completely, if it had not been assigned to the Federal Government, and when assigned its character did not change a particle, but it remained the police power, and under that police power, interpreted with the other provisions of the Federal Constitution, you cannot take a man's property from him; but the Congress has declared, and, so far as the Courts have passed upon it, they have said that under that assigned part of the State police power, the right did exist to regulate conditions of handling, and the prices of food and fuel. If the police power stops, it will stop when and where civilization and human rights stop, and not before. These questions are questions for each generation—each generation of free men; it ought to be so, and under the law, it is so.

Now, is there any rule for determining when the Federal Courts shall interfere, under the Fourteenth Amendment, with a State statute enacted under the police power? Yes. The best analogy, to my mind, is the basis on which an appellate court interferes with the verdict of a jury. If there is no basis on which a reasonable man could arrive at the result, it is set aside. Otherwise, it is not; even though the Court, sitting as a jury, might have found the facts the other way.

It is only when either no basis of fact exists on which to base the legislature's finding or when the remedy prescribed by the legislature has no possible relevant bearing or connection with the evil to be cured, that the statute is set aside.

As an illustration of that last feature, let us assume that the City of Indianapolis has passed an ordinance regulating the sale of fruit by retailers, which provides that the fruit shall be protected from flies and dirt by keeping proper netting over it, even prescribing the size of the openings in the netting. I assume that nobody would dispute that that was a reasonable exercise of the police power, to protect the health of the people. But, suppose the council, finding the same evil existing among these venders, not very cleanly and not acquainted with the germ theories regarding the spread of diseases through the excretions of insects, should prescribe as a remedy that these fruit venders should wear red plug hats? Of course, that ordinance would fall as an unreasonable, arbitrary, whimsical exercise of the police power, because, so far as we are now informed, there is no reasonable connection between the evil to be cured and the way in which the city council said it should be cured. But, as we have heretofore indicated, control of prices is known of old as a remedy for extortion.

This leads to the conclusion that all aspects of this bill are premature, except this one on the general power of the State. We are satisfied that the general power of the State to touch, in some way, upon the coal mining industry, exists. If, by actual orders, the State of Indiana, through its Coal Commission, should make a requirement upon some particular coal operator, that in-

stead of being favorable to his interests, like the supposititious order that I stated a while ago, was deemed by him to be detrimental to his interests—detrimental by reason of a conflict between the order and the rights guaranteed to him by the Federal Constitution, then he would have a right to complain. That would be the time to determine whether this particular order did, in fact infringe some right of the plaintiff—not theoretically, but in a way to inflict a trespass, an actual impending trespass upon his property rights. The question about contracts, and about violations and impairments of contract rights, could be raised at such a time. That is all purely speculative and conjectural, now. And it is also purely speculative and hypothetical, even now, to inquire whether the plaintiff in such a case would have a sufficient legal remedy in the Circuit Court of Marion County, or whether he would be entitled to the prompt intervention of the Federal Court.

This discussion of the one underlying principle involved in the hearing of this motion for the preliminary injunction also goes to the heart of the motion to dismiss. That is, there is in this bill—speaking now for myself, on the motion to dismiss, which is before the District Court—there is no basis in fact for injunctive relief, except this one of want of power. The power existing, that ground disappears from the bill and the other grounds present theories of what might happen and not allegations of fact respecting an existing situation—except as to those items of the $25 and the tax of one cent a ton.

The order will be that the application for a temporary injunction is denied, and on the motion to dis-

miss the order will be that the bill is dismissed without prejudice.

That means that there is absolutely nothing in the bill, now, in our judgment, that warrants either a temporary injunction or a final injunction.

You cannot make any proof as to a hypothetical condition in the future.

The bill will be dismissed without prejudice and the record may show affirmatively that there is absolutely nothing decided except the one question that the State, under its police power, can lay its hand upon the coal mining industry. There may be, today, wholly private businesses that we would have no hesitancy, today, in saying were beyond the reach of the legislature—saying so, just as we would say in case of a verdict of a jury, because there is no basis of fact upon which to predicate such a finding; but our sons, or our grandsons, may find a very urgent necessity for including that class of business, or enterprise, within the regulation of the State, under its police power.

My brethren graciously state that they concur in the views that I have endeavored to express for all of us.

The Court will stand adjourned until tomorrow morning.

Office Supreme Court, U. S.
FILED
MAR 3 1921
JAMES D. MAHER,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 731.

MARCUS BROWN HOLDING CO., INC., APPELLANT,

against

MARCUS FELDMAN, BENJAMIN SCHWARTZ, FRANK SCHWARTZ, AND EDWARD SWANN, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, IN THE STATE OF NEW YORK, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S REPLY BRIEF.

JOSEPH A. SEIDMAN,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 731.

MARCUS BROWN HOLDING COMPANY, INC., PLAINTIFF, APPELLANT,

against

MARCUS FELDMAN ET AL., DEFENDANTS, APPELLEES.

APPELLANT'S REPLY BRIEF.

We assumed that the sufficiency of pleading as to the amount in controversy was no longer in question and was not a subject for discussion on this appeal. The district court passed on this question and its answer was that "we may shortly note here that the jurisdictional amount is well pleaded, which is enough for the present purposes." (See Record, page 98, fol. 292.)

The lower court also held that, irrespective of the amount in controversy, the bill of complaint alleged sufficient facts

in support of jurisdiction under subdivision 14 of section 24 of the Judicial Code. (See opinion, at pages 96 and 97 of Record, fols. 288-289.)

The district attorney of the county of New York, one of the defendants and appellees, is, however, raising again the objections made by him below, and for the purpose of showing that the amount in controversy is less than the amount set forth in the bill he is making reference to the affidavits read in support of the motion for injunction, from which it appears that the lease made by the owner of the property to one Goldsmith provided for an annual rent of $3,800 for a period of five years; that plaintiff has not shown by the bill or by affidavit how much rent the defendants Schwartz and Feldman were paying under the lease, which expired September 30, 1920.

We are not asking for damages for the breach of a contract or for injury to person and property so as to permit of a computation of damages based upon the facts pleaded, and inconsistent with the allegation that the amount in controversy exceeds $3,000, exclusive of interest and cost.

In this suit, the amount, if at all necessary for the purpose of jurisdiction, is the value of the right to be protected or the extent of the injury to be prevented, which we show is more than $100,000. The bill of complaint shows a case within the class of the following cases:

In *North American Cold Storage Co. v. Chicago* (211 U. S., 306-321), the circuit court dismissed a bill of complaint for want of jurisdiction, which bill alleged, in substance, that an ordinance adopted by the municipal officers of the city of Chicago for the summary seizure and destruction of food in cold storage when unfit for human consump-

tion was in contravention of the Constitution. The circuit court ruled that the complainant's assertion of jurisdiction based upon an alleged Federal question was not well founded, and as there was no diversity of citizenship the court was without jurisdiction. Mr. Justice Peckham, speaking for the Supreme Court, said:

> "We think there was jurisdiction, and that it was error for the court to dismiss the bill on that ground. The court seems to have proceeded upon the theory that, as the complainant's assertion of jurisdiction was based upon an alleged Federal question which was not well founded, there was no jurisdiction. In this we think the court erred. The bill contained a plain averment that the ordinance in question violated the Fourteenth Amendment because it provided for no notice to the complainant or opportunity for a hearing before the seizure and destruction of the food. A constitutional question was thus presented to the court, over which it had jurisdiction and it was bound to decide the same on the merits."

In *Virginia v. Rives* (100 U. S., 313, approved in *Barney v. New York*, 193 U. S., 437) the court said:

> "It is evident, therefore, that the denial or inability to enforce in the judicial tribunals of the State rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States of which section 641 (U. S. Compiled Statutes 1901, p. 520) speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting

from it. * * * *When a State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decision,* and in such a case defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provision of section 641."

See, to the same effect:

Scott v. McNeal (154 U. S., 34).

Chicago, R. & Q. R. R. Co. v. Chicago (166 U. S., 226).

Furthermore, the complainant now shows that its vested rights are being interfered with by a statute enacted in contravention of the Constitution which makes a crime complainant's refusal to serve a trespasser of its property, and that this criminal statute subjects the complainant, its officers and agents to severe and numerous penalties which bring this case within the settled principles of law as expressed in *Wheeless v. Consolidated Gas Co.* (212 U. S., 40); *Ex parte Young* (209 U. S., 123); *Cramp & Son Eng. Co. v. Int. Curtis M. T. Co.* (246 U. S., 48); *Weed v. Lockwood* (266 Fed. Rep., 786); *Davis & Farnum Mfg. Co. v. Los Angeles* (189 U. S., 207); *Truax v. Raich* (239 U. S., 33); *Hofmann Brew Co. v. McElligott* (259 Fed. Rep., 525); *Holt v. Indian Mfg. Co.* (176 U. S., 68).

The test as to the amount in controversy in equity suits is wholly different from the one controlling purely legal actions. In equity suits the complainant does not seek to recover the reasonable value of the use and occupation of the premises or the rent reserved in the lease under which

the defendants came into possession or in the lease subsequently made which by its terms was to become operative on October 1, 1920. The controversy is as to the complainant's rights to the possession of its property which is wrongfully withheld by the defendants and other persons under color of statutes which not only impose a duty upon the complainant to perform an obligation which ordinarily could be created only by contract, express or implied, but also subjects the complainant to criminal prosecution for its failure or refusal to do or perform an act which by force of the organic law it is not under obligation to perform.

These statutes in effect created an encumbrance upon complainant's property, affecting its value and marketability, and the complainant asks in this suit that this court by its judgment adjust the legal and equitable claims of the parties and the subject of this suit, which is the title to property, and as was said by the court in the early case of *Stinson v. Dousman* (20 Howard, 461-467):

> "The subject of this suit is not merely the amount of rent claimed, but the title of the respective parties to the land under the contract. The contract shows that the matter in dispute was valued by the parties at $8,000 (citing *Bennett v. Butterworth*, 8 Howard, 124). We think this court has jurisdiction."

And so in this case the value of the property is $1,175,000, and it is shown that the encumbrance, if any, created by these statutes does not only affect the marketability of the title to the property, but also its value, and that it is diminished by not less than $100,000. In *Squire v. Robertson* (191 Fed. Rep., 731) it was held that for the purpose of determining jurisdiction of the Federal court the value of land

is the subject of suit and not the amount of contract obligation. In *Porter v. Northern Pacific* (161 Fed. Rep., 775) it was held that in an action for trespass praying for damages and general equitable relief the value of the land is to be taken into account in determining the right of removal. The same rule was applied by the court in *Shippiro v. Goldberg* (192 U. S., 240); *Kirby v. American Soda, etc., Co.* (194 U. S., 144); *Board of Trustees v. Berryman* (156 Fed. Rep., 115); *Berryman v. Whitman College* (222 U. S., 334); *Glenwood, etc., Co. v. Mutual, etc., Co.* (239 U. S., 121); *Greenfield v. U. S. Mortgage Co.* (133 Fed. Rep., 787); *Johnston v. Pittsburg* (106 Fed. Rep., 754); *Lanning v. Osborne* (79 Fed. Rep., 661).

Where the action is purely one to recover damages the rule, of course, is different. *Vance v. W. A. Vandercook Co.* (170 U. S., 468) and *North American T. & S. Co. v. Morrison* (178 U. S., 262) were just such actions—that is, actions to recover damages as distinguished from suits for equitable relief. In *Kirby v. American Soda Water Co.* (194 U. S. 142) the court, after referring to the rule stated in the cases last cited, said:

> "In the first place, the whole record being considered the value of the matter in dispute might well have been held to exceed $2,000 (citing *New England Mtge. Sec. Co. v. Gay* (145 U. S., 123); *La Vell v. Cragin* (136 U. S., 130)."

In suits in equity, even where the matter in controversy must, for jurisdictional purposes, exceed $3,000 exclusive of interest and costs, the court will not scrutinize the bill to ascertain what, if any, sum the plaintiff may ultimately recover in money damages in excess of the amount undisputed,

as in the case of common-law actions. In equity suits, and especially in suits for injunction, the amount in dispute is the value of the right to be protected or the extent of the injury to be prevented by the injunction (*Glenwood v. Mutual Life, etc., Co.*, 239 U. S., 119-121); *Scott v. Donald*, 165 U. S., 107-115; *McNeill v. Southern Railroad*, 202 U. S., 543; *Hunt v. New York Cotton Exchange*, 205 U. S., 322; *Bitterman v. Louisville & N. R. Co.*, 207 U. S., 171; and see pages 10, 11, and 12 of our reply brief in *Marcus Brown Holding Co. v. Arnold Pollak et al.*).

By the injunction in this suit the complainant's rights and interest in its property will be protected, not only against the defendants Marcus Feldman, Benjamin Schwartz, and Frank Schwartz, but also against all other persons who, under color of the statutes in question, wrongfully withhold from the complainant the possession of its property, which statutes also make its interference with their wrongful possession subject to the penal statute, which we claim is repugnant to the Constitution.

In the case of *Angle v. Chicago, St. Paul, Minn. & Omaha Ry. Co.* (151 U. S., 1), the court reversed a decree of the lower court sustaining a demurrer to a bill notwithstanding the fact that the court in that case adhered to the rule that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power and does not extend to the matter of expediency, the motive of the legislators, or the reasons which were spread before them to induce the passage of an act, and that the question of constitutionality cannot be brought up collaterally or incidentally before the court upon an issue arising upon a private contract between two individuals, yet the court there said:

"If the disabled condition of the Portage Company has been brought about by the wrongs of the Omaha Company, the courts are open, and the accepted maxim in those tribunals is that where there is a wrong, there is a remedy. It thus subserves the interests of the public and leaves the redress of the wrong to that department which has not only the requisite jurisdiction, but also the appropriate machinery for ascertaining the amount of the injury, and enforcing the due compensation. * * *

"The Legislature may proceed with sole regard in all its actions to the public interests, with the assurance that all questions of wrong and loss between individuals will be settled in the judicial department, and that its own action in subserviency to the public interest will bar no redress of a private wrong unless such bar be absolutely necessary to the accomplishment of the public interest. But it is said that to permit this suit to be maintained, and to subject these lands in the possession of the Omaha Company to the satisfaction of the judgment against the Portage Company, is, *pro tanto*, to nullify the action of the Legislature, that in taking the lands away from the one company and giving them to the other, it intended that the transfer should be absolute without limitation and subject to no contingencies or burdens. * * *

"Conceding all this, it is equally to be presumed that it left the redress of private wrongs to the judicial department. * * * Passing now to the other of the two objections, it may be conceded that an action at law would lie for the damages sustained by the Portage Company, through the wrongful acts of the Omaha Company. Indeed, that is a fact which underlies this whole case. Yet, while an action at law would lie, it does not follow that such remedy

was either full or adequate. Waiving the question as to the solvency of the Omaha Company, and assuming that any judgment against it for damages could be fully satisfied by legal process, there remains the proposition that it is contrary to equity that the defendant should be permitted to enjoy unmolested that particular property, the possession of which it sought to secure, and did in fact secure by its wrongful acts. Ought the Portage Company to be compelled to experiment with the solvency of the Omaha Company before coming into a court of equity? While no express trust attached to the title to these lands, either in the Portage or in the Omaha Company—while it may be conceded that when the Legislature resumed the grant it took the title discharged of any expressed trust or liability in favor of the creditors of the Portage Company, and might have transferred an absolute title to any third party beyond the reach or pursuit of the Portage Company or its creditors—yet, it is still true that the lands were given to the Portage Company as they had been given by Congress to the State in the first instance for the purpose of aiding in the construction of this road. * * *

While no express trust is affirmed as to the lands, yet it is familiar doctrine that a party who acquires title to property wrongfully may be adjudged a trustee *ex maleficio* in respect to that property. * * * The wrongdoing of the defendant, the Omaha Company, has wrested the title to this property from the Portage Company and transferred it to itself. It has become, therefore, a trustee *ex maleficio* in respect to the property. It follows from these considerations that the court erred in sustaining the demurrer to this bill, and the decree of dismissal must be reversed. * * *"

The State Legislature has seen fit to suspend the remedy in ejectment and summary proceedings for the recovery of possession of property wrongfully trespassed upon, which, as we have shown in our briefs previously submitted and hereinafter more particularly discussed, deprives the lawful owner of a vested property right. In an action at law in this court to recover possession of its property, the complainant in order to maintain such action would have to base his right to the legal remedy upon the common law as modified by the State Constitution and State laws not in conflict with the Federal Constitution. Assuming the housing legislation to be unconstitutional, this court could not in a legal ateion restore the operation of the laws which by this obnoxious and pernicious legislation were suspended. In other words, if the complainant had brought an action in this court to recover possession of his property, commonly known as an action in ejectment, this court might render a judgment awarding it the possession of the property if in its opinion the housing legislation is in conflict with the Constitution. But a judgment awarding the possession would not afford to the complainant complete relief. Under the common law only nominal damages could be awarded in an action in ejectment. Rents and profits in an action for ejectment were not recoverable. More than one action would be necessary in order to afford the complainant relief for damages sustained.

In Lancaster *v.* Kathleen Oil Co., 241 U. S., 553, 555, it was alleged that the lessee in an oil gas mining lease was entitled to possession of certain lands in possession of another who claimed to be the lessee of the same premises and who claimed that the complainant's lease was void because of the

restrictions imposed by statute. The complainant alleged that the restrictions imposed by the statute in question were in contravention of the Constitution and that therefore the act of the Secretary of the Interior in approving the defendant's lease was void. The complainant demanded a mandatory injunction. The lower court dismissed the bill for want of jurisdiction. White, C. J., in reversing the decree of the lower court, said:

> "In support of the proposition that such allegations were not material, it is argued that the suit was the equivalent of an action at law in ejectment to recover possession of the leased premises, but was brought in equity because, under the law of Oklahoma, a lessee of an oil and gas mining lease under circumstances here disclosed has no right to sue in ejectment. * * * Further, it is said that as, in a suit in ejectment, it is only necessary to allege a right of possession by the plaintiff and a wrongful possession by the defendant, averments by anticipation of assumed defects in the plaintiff's title, to be alleged by the defendant, and of the causes which would be relied upon to establish want of title in the defendant, are not relevant or essential, and are to be disregarded in determining the question of the jurisdiction of the court as a Federal court. This, it is said was expressly decided in *Taylor v. Anderson*, 234 U. S., 74; 58 Law Ed., 1218; 34 Sup. Ct. Rep., 724, and that case is relied upon as conclusive of this controversy.
>
> But without questioning in the slightest degree the doctrine expounded or the conclusion reached in the *Taylor* case, we think it can here have no application. * * * We say this because the prayer of the bill makes it clear that the object of the suit was not only the recovery of possession, but also an

injunction forever restraining the defendant company from asserting any rights under its lease, and from interfering with the rights of the plaintiffs under their lease. Such relief, it is apparent, could be granted only after determining the rights of the parties under their respective leases, which would require a construction of the act of Congress referred to as well as a decision concerning the authority of the Secretary of the Interior in approving of the defendant company's lease, and the effect to be given to such approval."

In the case of *Guffey v. Smith*, 237 U. S., 115, 118, the court said:

"It is also settled that in the courts of Illinois a holder of such a lease cannot maintain an action in ejectment thereon (citing cases). And by reason of the legislation of Congress requiring that, in actions at law in federal courts of the first instance, effect shall be given to the local laws and modes of proceeding (Revised Stat., secs. 721, 914; Comp. Stat. 1913, secs. 1538, 1537). It results that the complainant could not have maintained an action of ejectment in the circuit court. An action for damages, of course, would not have afforded a plain, adequate and complete remedy in the circumstances, and if such a remedy was to be had, it was necessary to resort to a suit in equity for an injunction, discovery, and accounting, as was done (citing cases). Thus the principal question for decision is whether such a suit could be successfully maintained in the circuit court, diverse citizenship and the requisite jurisdictional amount being conceded. * * * By the legislation of Congress and repeated decisions of this court it has long been settled that the remedies

afforded and modes of proceeding pursued in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting. Rev. Stat., secs. 913, 917; Comp. Stat. 1913, secs. 1536, 1543; *Neves v. Scott*, 13 How., 268, 272; 14 Law Ed., 140, 142; *Payne v. Hook*, 7 Wall., 425, 430; 19 L. Ed., 260, 261; *Dodge v. Tulleys*, 144 U. S., 451, 457; 36 L. Ed., 501, 503; *Mississippi Mills v. Cohn*, 150 U. S., 202, 204; 37 L. Ed., 1052, 1053; 14 Sup. Ct. Rep., 75. * * * Rightly understood, this is not a suit for specific performance. Its purpose is not to enforce an executory contract to give a lease, or even to enforce an executory promise in a lease already given, but to protect a present vested leasehold, amounting to a freehold interest, from continuing irreparable injury calculated to accomplish its practical destruction. The complaint is not that performance of some promised act is being withheld or refused, but that complainant's vested freehold right is being wrongfully violated and impaired in a way which calls for preventive relief."

The argument of the other appellees is more or less based on cases involving regulatory or supervisory statutes. We do not question the power of the Legislature to enact legislation for the regulation of apartment buildings. We object because these statutes regulate nothing; they merely operate on particular contracts for the purpose of impairing the obligations thereby created and take the private property from the owners and transfer the right of possession to persons holding over and only for the private and exclusive use and benefit of the latter.

Before the adoption of the first New York Constitution the general principle of law that as between the State and its citizens with respect to rights of property the State could not, except for the purpose of taxation, take a man's property without compensation was fortified by the specific declarations of the Bill of Rights which provided:

> "No part of a man's property can be justly taken from him or applied to public use without his consent or that of his legal representatives."

All lands within the State of New York are declared allodial—the entire property being vested in the owner subject only to the right of the State to impose taxes for common welfare, and subject to escheat.

> N. Y. Const. 1846, art. 1, §4.
> N. Y. Const. 1894, art. 1, §10.
> 1 N. Y. Rev. St. 1813, p. 380, §2, and page 718, §1.

These constitutional limitations do not, however, affect the State's right to restrict the heights of buildings or to create zones, fire limits, etc. Legislation of this character is more or less declaratory of the common law and public custom, the force of which was fully recognized when the Constitution was adopted.

> "Some things are by nature itself incapable of appropriation, so they cannot be brought under power of anyone. These got the name of *Res Communes* by the Roman Law, and were defined 'things the property of which belongs to no person, but the use of all.' Thus the light, the air, running water, etc., are so adapted to the use of mankind that no one

individual can acquire a property in them or deprive others of their use."

1 John Erskine, An Institute of the Laws of Scotland, Macclellan Ed., page 196.

This is a universal principle of law.

Gray *vs.* McWilliams, 98 Cal., 157, 161.
Clawson *vs.* Primrose, 4 Del. Ch., 643.
Sweet *vs.* Syracuse, 129 N. Y., 316.

All of the cases cited by counsel for tenants appellees on pages 41 and 42 to 50, inclusive, fall within the class of cases governed by the principle of law above stated.

JOSEPH A. SEIDMAN,
Solicitor for Appellant.

DATED WASHINGTON, *March* 31, 1921.

Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK

Supreme Court of the United States

October Term 1920.
No. 731.

MARCUS BROWN HOLDING COMPANY,
Appellant,

against

MARCUS FELDMAN, et al.,
Respondents.

POINTS FOR EDGAR A. LEVY LEASING CO., INC. AND 810 WEST END AVENUE INC. ~~VS.~~ ~~STERN~~ AS AMICI CURIAE ON CONSTITUTIONALITY OF CHAPTERS 136, 944 AND 947 OF THE NEW YORK LAWS OF 1920.

LOUIS MARSHALL,
LEWIS M. ISAACS,
For Interveners.

B. H. Tyrrel, Printer, 206-8 Fulton Street, New York.

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Supreme Court of the United States,

OCTOBER TERM, 1920.

No. 731.

MARCUS BROWN HOLDING COMPANY,
Appellant,

against

MARCUS FELDMAN, *et al.*,
Respondents.

Points for Edgar A. Levy Leasing Co., Inc. and 810 West End Avenue, Inc. ~~v. Stern~~, as amici curiae on constitutionality of Chapters 136, 944 and 947 of the Laws of 1920.

By permission of the Court this argument, which, in its main aspects, has been presented to the New York Court of Appeals, is submitted, the vast importance of the questions involved being regarded as a justification. It is regrettable that this case, involving, as it does, the constitutionality of a series of statutes enacted by the Legislature of New York in April and September, 1920, and which are now under advisement by the Court of Appeals, should have been moved for argument before the highest court of the State has rendered

its decision. Whilst this case directly challenges Chapter 951 of the Laws of 1920, an act of minor importance, the bill of complaint is so framed as to invite a consideration of ten other acts which, if at all, are only incidentally involved. The parties directly interested in the main controversy growing out of the New York legislation are not parties to the record now before this Court. On the other hand, the cases before the Court of Appeals, nine in number, which present every phase of this legislation, were elaborately discussed by all parties concerned before that Court in January, three full days being devoted to the hearing of the arguments.

Two of these statutes, Chapters 944 and 947 of the Laws of 1920, which are of primary importance and which are printed in full in the Appendix to this argument, were passed upon by the Appellate Division of the First Department of the New York Supreme Court, the first in the case of *Edgar A. Levy Leasing Co., Inc.* v. *Siegel*, and the second in *Guttag* v. *Shatzkin* and *810 West End Avenue, Inc.* v. *Stern*. Chapter 944 was sustained in the Appellate Division by a divided Court, Justices Laughlin, Merrill and Greenbaum having voted to uphold the act and Presiding Justice Clarke and Mr. Justice Dowling dissenting from that decision. Chapter 947 was declared unconstitutional by that Court, Justices Laughlin, Clarke, Dowling and Greenbaum being of the opinion that it was void and Mr. Justice Merrill dissenting.

The counsel who are the attorneys of record in the case now under argument in this Court filed briefs in the Appellate Division and in the Court of Appeals as *amici curiae*, whilst in both cases Messrs. Guthrie and Cohen, representing the At

torney General, participated in the argument both in the Appellate Division and in the Court of Appeals.

We were not informed until a few days ago that the present case had been appealed to this Court and that a motion to advance it was to be made on Monday of the present week. Hence the Points now presented are of necessity practically a reproduction of our arguments in the Court of Appeals.

It may be added that the cases in the Court of Appeals involve not only questions arising under the Federal Constitution, but also such as relate to specific provisions of the State Constitution.

POINTS.

I.

The defense based on Chapter 944 of the Laws of 1920 is not maintainable because the act is unconstitutional, in that it deprives the landlord of his liberty and property without due process of law, denies to him the equal protection of the laws, and impairs the obligation of the contract between the plaintiff and the defendant.

Although this act purports to amend generally Chapter 136 of the Laws of 1920, it in effect repeals that act and substitutes an essentially different law. We do not intend to intimate that Chapter 136 was a valid enactment. On the contrary, we contend that it was not and that all of the vices inherent in the amendatory act are contained in the original statute. Yet the later act

being subject to all of the objections of the former, and to others in addition, it will avoid diffuseness to confine our discussion practically to a consideration of it.

(a) *The substantial provisions of Chapter 944 of the Laws of 1920.*

Section 1, after making recitals which will be hereafter considered, declares:

> "* * * it shall be a defense to an action for rent accruing under an agreement for premises in a city of the first class or in a city in a county adjoining a city of the first class occupied for dwelling purposes that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive."

Section 2 provides:

> "Where the answer contains the defense mentioned in section one of this act, the plaintiff within five days after the filing of the answer or within such time as the court upon good cause shown may determine, shall file with the clerk of the court a verified bill of particulars, setting forth the gross income derived from the building of which the premises in question are the whole or a part; the number of apartments in the building and the number of rooms in each apartment, and the number of stores in such building; the rent received for each such apartment or store for the period of one year last past; the consideration paid by the landlord for the building, if he be the owner thereof, or if he be a lessee the rent agreed to be paid by him; the assessed valuation of the property and the taxes for the current year; the annual interest charge on any incumbrance paid by the land-

lord; the operating expenses with reasonable detail; and such other facts as the landlord claims affect his net income from such property. Issue shall not be deemed joined until the filing of such bill of particulars. Upon the plaintiff's failure to file said bill of particulars within the time limited the court upon motion of the defendant shall dismiss the complaint."

Section 3 provides:

"Where it appears that the rent has been increased over the rent as it existed one year prior to the time of the agreement under which the rent is sought to be recovered, such agreement shall be presumptively unjust, unreasonable and oppressive."

Section 4 reads:

"Nothing herein contained shall prevent the plaintiff from pleading and proving in such action a fair and reasonable rent for the premises and recovering judgment therefor, or from instituting a separate action for the recovery thereof."

Section 6 provides:

"If in any action for rent or rental value, the issue of fairness and reasonableness of the amount demanded in the complaint be raised by the defendant, he must at the time of answering deposit with the clerk such sum as equals the amount paid as rent during the preceding month or such as is reserved as the monthly rent in the agreement under which he obtained possession of the premises. * * * Such deposit shall be applied to the satisfaction of the judgment rendered or otherwise disposed of as justice requires. Where a judgment is rendered for the plaintiff it shall contain a provision that if the same be not

fully satisfied from the deposit or otherwise within five days after the entry, and service on the defendant of a copy thereof, the plaintiff shall be entitled to the premises described in the complaint and a direction that warrant shall issue commanding the sheriff, marshal or other officer charged by law with the duty of executing judgments to remove all persons therefrom."

Other sections will be hereafter incidentally considered.

(b) *The acts in pari materia.*

Concurrently with the enactment of this statute there were also enacted Chapter 942 of the Laws of 1920, restricting the right of a landlord to maintain summary proceedings to recover the possession of real property occupied for dwelling purposes in cities of a population of one million or more and cities in a county adjoining such city; Chapter 943 of the Laws of 1920, which provided for a stay of proceedings on an appeal from a final order in a summary proceeding; Chapter 945 of the Laws of 1920, which likewise amended the Code of Civil Procedure in relation to summary proceedings and contained provisions similar to those set forth in Chapter 944 of the Laws of 1920; Chapter 947 of the Laws of 1920, which amended the Code of Civil Procedure in relation to actions to recover the possession of real property occupied for dwelling purposes in a city of a population of one million or more and in a city in a county adjoining such city, by declaring that no such action shall be maintainable until November 1, 1922; Chapter 948 of the Laws of 1920, which amended Chapter 137 of the Laws of 1920 in rela-

tion to summary proceedings, by making it applicable only to such as are maintained in a city of the first class having a population of one million or less, or in a city in a county adjoining a city of the first class; Chapter 950 of the Laws of 1920, which amended the Code of Civil Procedure in relation to summary proceedings by providing that wherever proceedings are brought to vacate a final order rendered upon default of the tenant the court may, pending the motion to vacate such order, stay the execution of the warrant issued upon such default, and Chapter 951 of the Laws of 1920, which amended Section 2040 of the Penal Law in relation to the wilful violation of the terms of a lease.

(c) *An analysis of the legislation.*

All of these acts are in *pari materia* and give evidence of a general legislative purpose to take from the owners of real property rented for dwellings in the localities to which the acts relate the rights heretofore enjoyed by such owners, and to enable tenants to continue in the possession of demised premises in violation of the terms of the contract of leasing entered into between the landlord and the tenant, and, where the terms of the lease have ended, to continue nevertheless in the possession of the premises occupied without the consent of the landlord. All remedies heretofore fore possessed by the landlord to obtain possession of his premises either for a default in payment of rent or because of the termination of the tenancy are taken away. The tenant becomes the dominating factor and the landlord is permitted to receive such compensation only for the use of his

premises as a jury of tenants may deem fair and reasonable, regardless of contract and of the unwillingness of the landlord that the tenant shall remain in possession of the premises.

It is safe to say that never before in the history of our country has legislation of so revolutionary a character been undertaken. Private property, devoted to purposes essentially private, is sought to be taken out of the control of the owner and to be placed into the possession and occupancy of another on terms not in accordance with the contract actually entered into between the owner and such person, but on such terms as the court or jury may fix. In other words, the Legislature takes the property of A and gives it to B for an indefinite period on terms which A is unwilling to accept but which he is to be forced to accept *nolens volens*. If the tenant refuses to pay the stipulated rent or if he holds over after the expiration of his term the landlord cannot regain possession of his premises, because, by these acts, he has been stripped of the right to maintain a possessory action, whether it be by ejectment or by summary proceedings. Should he sue to recover the rent stipulated by the contract, he is met by the defense that the terms of the contract are unjust and unreasonable, and if the amount of the stipulated rent is greater than the rent paid for the use of the premises a year prior to the date of the agreement under which the rent is sought to be recovered, he is confronted by a statutory presumption that the rent sought to be recovered is unjust and oppressive. The burden of overcoming this presumption is imposed on him. In spite of the fact that there has been an express agreement, in contravention of the well-established rule that a con-

tract will not be implied where the parties have entered into an express contract, he has the option of either going empty out of court, should he in the opinion of an interested jury be unable to overcome this presumption, or of being constrained to recover for use and occupation on a *quantum meruit* in lieu of the stipulated rent. The owner of the property is therefore driven to the alternative of accepting from the occupant of his premises such an amount of rent as the latter is willing to pay regardless of his written covenant, or of suing upon such covenant and establishing to the satisfaction of the tribunal which is to pass upon the question of the reasonableness of the rent that the presumption of injustice, unreasonableness and oppression created by the statute is inapplicable to the contract. He is thus compelled either to submit to the determination of the tenant as to what rent he is willing to pay, or to incur the expense, the vicissitudes and the delay of litigation in an effort to enforce his contract.

(d) *The absence of standards by which the validity of the agreement sued on is to be determined.*

The statute prescribes no standards by which the justice and reasonableness and freedom from oppression which must be established in order to warrant a recovery under the laws, are to be determined.

That such standards are necessary in order that there may be due process of law is illustrated by the decisions in *International Harvester Co.* v. *Kentucky, 234 U. S. 216, Collins* v. *Kentucky, 234*

U. S. 634, and *American Seeding Machine Co.* v. *Kentucky, 236 U. S. 660.* Although these cases arose under the criminal law, there can be no doubt but that, if the Legislature of New York had the right to pass the statute which we are now analyzing, it could, with equal right, have made it a felony or misdemeanor for a landlord to enter into a lease providing for the payment of an unjust and unreasonable rent or oppressive in its features. In fact Chapter 951 of the Laws of 1920 subjects the landlord to criminal prosecution should he fail to supply a tenant holding over after the expiration of his term of declining to pay the rent contracted for with heat, elevator service or other conveniences appurtenant to the tenancy.

In the first of the cases cited the act sought to be enforced was an anti-trust law. As interpreted by the Court of Appeals of Kentucky it provided that any combination for the purpose of controlling prices lawful unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the articles which were the subject-matter of the alleged trust, was criminal. Dealing with this statute Mr. Justice Holmes said:

> "The plaintiff in error contends that the law as construed offers no standard of conduct that it is possible to know. To meet this, in the present and earlier cases the real value is declared to be 'its market value under fair competition, and under normal market conditions.' * * * We have to consider whether in application this is more than an illusory form of words, when nine years after it was incorporated, a combination invited by the law is required to guess at its peril what its product would have sold for if the combination had not existed and nothing else violent-

ly affecting values had occurred. It seems that since 1902 the price of the machinery sold by the plaintiff in error has risen from ten to fifteen per cent. The testimony on its behalf showed that meantime the cost of materials used had increased from twenty to twenty-five per cent. and labor twenty-seven and one-half per cent. Whatever doubt there may be about the exact figures we hardly suppose the fact of a rise to be denied. But in order to reach what is called the real value, a price from which all facts of the combination are to be eliminated, the plaintiff in error is told that it cannot avail itself of the rise in materials because it was able to get them cheaper through one of the subsidiary companies of the combination, and that the saving through the combination more than offset all the rise in cost.

This perhaps more plainly concerns the justice of the law in its bearing upon the plaintiff in error, when compared with its operation upon tobacco raisers who are said to have doubled or trebled their prices, than on the constitutional question proposed. But it also concerns that, for it shows how impossible it is to think away the principal facts of the case as it exists and say what would have been the price in an imaginary world. Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact and generally more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would seem, with exclusion also of any increased efficiency in the machines but with inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no

human ingenuity could solve. The reason is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relative to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be judged by it. In our opinion it cannot stand."

In *Collins* v. *Kentucky, supra,* the defendants were tobacco growers. They were charged with the violation of a statute which prohibited persons engaged or participating in a pool by means whereof to fix, control or regulate the price of any commodity or article by raising or depreciating or attempting to raise or depreciate it above or below its real value. Mr. Justice Hughes, after referring to the case last cited, said:

"The Harvester Company was prosecuted for being a party to a price-raising combination; Collins, for breaking a combination agreement and selling outside the pool which he had joined. With respect to each, the test of the legality of the combination was said to be whether it raised prices above the 'real value.' If it did—in Collins' case—he would be subject to penalties for remaining in the combination; if it did not, he would be punished for not keeping his tobacco in the pool. He was thus bound to ascertain the 'real value'; to determine his conduct not according to the actualities of life, or by reference to knowable criteria, but by speculating upon imaginary conditions and endeavoring to conjecture what would be the value under other and so-called normal circumstances with fair

> competition, eliminating the abnormal influence of the combination itself, and of all other like combinations which these were organized to oppose. The objection that the statute, by reason of its uncertainty, was fundamentally defective was as available to Collins as it was to the Harvester Company."

This Court has just decided (February 28, 1921) in *United States* vs. *L. Cohen Grocer Co.*, and other cases involving the constitutionality of the Lever Act that it was void because of the vagueness and indefiniteness of a provision which made it unlawful for any person willfully "to make any unjust or unreasonable rate or charge in handling or dealing in * * * necessaries."

As was said in that case in the Court below:

> "No man would engage in business and no self-respecting man would remain in business, if his fortune, good name, or liberty is to be determined solely by the heated and prejudiced views of what is unjust and unreasonable, which may be entertained by a jury personally embarrassed and harassed, it may be, by the inordinate rise in prices of all commodities." (264 Fed. Rep. 223).

There are fifty-two Supreme Court Justices, ten City Court Justices and forty-five Municipal Court Justices in the City of New York. Each may have his own personal standards. The rental to be paid for similar apartments located on 107 different pieces of property may thus be determined according to 107 different standards, with 107 varying results, all dependent upon the length of the chancellor's foot.

Moreover, the tenant is entitled to and is swift to demand a right of trial by a jury on the defense which he is thus permitted to interpose. Hence, there may be as many different valuations with

respect to apartments of equal character located in a single building, as there are apartments whose rental value is to be established and as there are juries called upon to make the valuation.

(e) *In the provision relating to a bill of particulars the essential elements entering into the ascertainment of rental value are omitted.*

We have said that the act provides no standards. We might better say that, so far as there is any suggestion as to what may or may not be proven for the purpose of overcoming the statutory presumption, the most essential elements of value are omitted. The bill of particulars which the plaintiff is compelled to furnish under penalty of having his complaint dismissed, requires a statement of (a) the gross income derived from the building of which the premises are the whole or a part; (b) the number of apartments in the building and the number of rooms in each apartment; (c) the number of stores in the building; (d) the rent received for each apartment or store for the period of one year last past; (e) the consideration paid by the landlord for the building if he be the owner, or if he be a lessee the rent agreed to be paid by him; (f) the assessed valuation of the property and the taxes for the current year; (g) the annual interest charge on any incumbrance paid by the landlord; (h) the operating expenses with reasonable detail; (i) such other facts as the landlord claims affect his net income from such property.

The most important of all elements affecting value are entirely ignored.

(1) There is no suggestion that the market value of the property or its rental value has anything to do with the question to be determined. Nor is there anything to indicate that reproduc-

tion or replacement value is to be taken into account.

(2) If this were a proceeding in condemnation it would be of little consequence what the original cost of the property may have been or what its value was at a period anterior to the condemnation. The same considerations apply in cases where the rates for service rendered by a public utility are to be determined. In all of them the just compensation to which the owner is entitled is a fair return on the value of the property at the time when the service is rendered, not five or ten years before that time,—in other words, the present value of the property.

Smyth v. *Ames*, *169 U. S. 466, 524.*
San Diego Land & Town Co. v. *National City*, *174 U. S. 739, 753, 754, 757.*
Cotting v. *Kansas City Stock Yards Co.*, *183 U. S. 79, 85, 86, 91-97.*
San Diego Land & Town Co. v. *Jasper*, *189 U. S. 439, 442.*
City of Knoxville v. *Knoxville Water Co.*, *212 U. S. 1.*
Wilcox v. *Consolidated Gas Co.*, *212 U. S. 19, 41, 52.*
Minnesota Rate Cases, *230 U. S. 434.*
Kansas City Southern Ry. v. *Interstate Commerce Commission*, *252 U. S. 178.*

In *People ex rel. N. Y. C. & H. R. R. R. Co.* v. *Public Service Commission*, *215 N. Y. 241, 247, 248*, decided in 1915, where the court held that the commission was not justified in casting upon the railroad company the burden of proving that an increase of rates after an interval of three years from the establishment of a previous rate was reasonable, Judge Hiscock, with almost a sense of prophecy, said:

"In the second place, even if we should assume that these rates when established in 1907 were compensatory, in my opinion the presumption did not follow that this condition and result would indefinitely continue. * * * There is no recognized presumption that what was a fair price for any commodity in 1907 would be a fair price for the same commodity in 1910 in the absence of some evidence showing that conditions had remained stable. No court would receive as evidence of the value of ordinary commodities such as foodstuffs and coal or even of real estate proof of values which prevailed three years before unless it was supplemented by other evidence of the continuity of governing conditions, and common experience and observation do not sustain the belief that there has been any unusual stability during the last few years in prices entering into the cost of railroad operation which must be compensated by rates."

(3) The property may have been purchased by the owner ten years ago, at a time when real estate values were low, when land could have been purchased at a comparatively moderate price, when the cost of labor and the price of materials were less than one-half of what they are today. The property may have been inherited by the present owner. It may have come to him as a gift. The neighborhood in which the property is located may have so developed as to enhance the value of the property to a marked degree. The expense of operation from one month to another may have been constantly increasing. There are items of expense that cannot ordinarily be anticipated.

(4) In the determination of the rental value of real property it is necessary to consider the actual

return on the investment made by the owner of the property over a series of years, and also the market value of the property. It is well known that for a considerable part of the time since 1910 landlords realized a very inconsiderable return on their investments. After the payment of interest on mortgages, taxes, insurance, and other charges very few flats and apartment houses paid the equivalent of the legal rate of interest, and in many instances property of that character was operated at a loss. During that period many foreclosure actions were instituted and many sales under decrees of foreclosure took place. There were also many instances where the mortgagors conveyed the property to the mortgagees in order to avoid the expense of foreclosure. It was only since 1918 that there has been a falling off in the number of foreclosures and sales. This clearly shows that the mere fact that there have been recent increases in rent is not due to a desire on the part of the landlords to oppress their tenants, but results entirely from the operation of economic principles applicable to every occupation and to every class of business. This includes the doctrine of averages and the law of supply and demand. To quote from Judge Cardozo in *Municipal Gas Co.* vs. *Public Service Commission*, 225 N. Y. 96:

> "It is by the average of the year that business commonly reckons its losses and its gains. On the other hand, there may be times when the average must be distributed over periods still longer."

During the years of depression in real estate it was the tenants who took advantage of the land-

lords by making a multitude of demands, which it was within their power to enforce because of the desire of the landlords to keep their premises occupied. Free rent for a part of the term, extensive alterations, long terms at low rentals, may be mentioned by way of illustration on concessions which landlords were required to make. It would have been deemed farcical in those days had the landlords applied to the legislature for a statute requiring the tenants to pay a just and reasonable rental and to refrain from insisting upon requirements which the landlords regarded as onerous and oppressive.

The following is a list of foreclosure actions and sales under foreclosure taken from the official records of the County Clerks in New York, Bronx, Kings and Queens counties from 1910 to 1920:

	New York County.		Bronx County	
	Number of Foreclosures	Number of Sales Under Foreclosure	Number of Foreclosures	Number of Sales Under Foreclosure
1910..	1,281	516	601	232
1911..	1,226	484	847	349
1912..	1,329	601	910	512
1913..	1,403	634	834	498
1914..	1,435	719	915	463
1915..	1,524	884	937	521
1916..	1,393	718	892	545
1917..	1,392	723	869	532
1918..	1,126	648	660	343
1919..	757	490	396	247
1920..	446	234	245	111

	Kings County		Queens County	
	Number of Foreclosures	Number of Sales Under Foreclosure	Number of Foreclosures	Number of Sales Under Foreclosure
1910..	4,263	125	437	911
1911..	4,187	317	699	975
1912..	3,802	320	765	994
1913..	3,829	467	1,098	969
1914..	3,400	435	1,015	902
1915..	3,413	425	1,127	948
1916..	2,859	447	1,091	894
1917..	2,753	417	1,453	897
1918..	1,783	265	927	691
1919..	1,233	136	699	432
1920..	1,052	31	663	176
Total	32,574	3,385	9,974	8,789

(5) No consideration whatsoever is given to the fact that, for many years the owners of apartment houses in the City of New York were obliged to rent their premises under conditions which frequently led to their operation at a loss or for a return so inadequate as to net the owner an income of considerably less than the legal rate of interest. During those periods the tenants took advantage of market conditions, as they naturally will and and have a right to do, whenever the opportunity presented itself to them of availing of the opportunity to move to other premises on more favorable terms, even though the reduced rental that the landlord was under the circumstances constrained to accept would not yield him a reasonable profit. An application by the landlords to the Legislature for the enactment of a law that would afford a return of ten per cent. on their in-

vestment would have been greeted with derision and indignation.

(6) It is also a well-recognized fact that in a large percentage of apartment houses there exist constant vacancies which on an average are estimated to constitute approximately ten per cent. of the renting space, and these vacancies are apt to increase in consequence of conditions frequently arising, as, for example, neighborhood changes, which the landlord is unable to foresee or control. It is likewise inevitable that the landlord frequently sustains pecuniary losses due to the unwillingness or inability of tenants to pay their rent and to the fact that they are apt at times without notice, or upon insufficient notice, to change their habitations without regard to its effect upon the landlord and to the circumstance that on such removal it becomes impracticable for the landlord to relet the abandoned premises for months at a time. There is also the element of deterioration, of obsolescence, of the likelihood that more modern construction will eventually result in a shrinkage in values of buildings already constructed, because the latter become less desirable than those newly erected. There is the certainty that in time the lean kine will devour the fat.

These and many other elements enter into the determination by the landlord as to what he regards as a proper return upon his investment and for the expense and risks that he incurs. All of them are ignored by the terms of this statute.

(7) The Legislature, however, leaves the determination of the complicated question of rental value at a time when all prices and values of the necessaries of life have risen, with the consequent and universal irritation resulting therefrom, to a

court or jury with respect to each case as it may arise, without providing guide or compass or defining a standard enforceable by the owner of the property as well as by the tenant. If it should appear that the agreed rental is less than it could be proven that it legitimately might have been, the tenant can only be required to pay the stipulated rental. If during the term of the lease the prevailing rental value of the property should be enhanced, the tenant could not be required to pay more than he agreed to pay. The fact that the lease runs for a term of years and that the vicissitudes incidental to our economic life may bring about a change of conditions and of values, are necessary elements in price or rental value. Yet, under this statute, the landlord is to bear all risks and the tenant is to be enabled at will to assert the obligation of the landlord's covenant or to deny the validity of his own.

(*f.*) *The provision creating a statutory presumption of injustice, unreasonableness and oppression.*

The fundamental theory of the statute is, that if the rent has been increased over the rent as it existed one year prior to the time of the agreement under which the rent is sought to be recovered the agreement between the landlord and the tenant is presumptively to be rejected. Therefore an agreement made in May, 1920, for a term beginning October 1, 1920, running for ten years, is to be disregarded because, at the time when the agreement was made, the tenant was in possession under a lease made in 1910 or 1915 or 1918 which fixed a lower rental than that stipulated under the new lease. Under the terms of the statute it is not

even necessary that the lease with which the comparison is made was with the tenant with whom the new lease was entered into. The old lease may have been made with A, who did not desire a renewal, and the new lease may have been made with B who had never before been a tenant of the owner of the property. Yet under this statute the fact that B covenanted to pay a larger sum by way of rental than A did during the last year of his term would give B the benefit of the statutory presumption. In fact, under the plain reading of this statute, if the premises rented to B were in a building which had been completed just before this act went into effect but had never been occupied by any tenant, he might nevertheless defend an action for the recovery of the rent accruing under the agreement on the ground that the rent was unjust and unreasonable and the agreement under which it is sought to be recovered, oppressive.

The provision that a mere increase in the rent of demised premises over the rent as it existed one year prior to the agreement under which it is sought to be recovered, renders the contract presumptively unjust, unreasonable and oppressive, is arbitrary and unreasonable and offends against the due process clause. Read in context with Section 1, it may well be argued that the presumption sought to be created is one of law and not one of fact. Section 1 lays down the proposition that it is a defense to an action for rent accruing under an agreement, that the rent is unjust and unreasonable and the agreement oppressive. There is no reference in this section to any previous rental. According to its terms even though the same rental as that stipulated in the new lease

may have been paid a year prior to the time of the agreement or ten years prior to that time a defense arises, if the rent, whatever it may be, and whatever its relation to previous rentals, is unjust and unreasonable and the agreement is oppressive.

When, therefore, it is enacted that an increase over previous rent makes the agreement presumptively unjust, unreasonable and oppressive, it would seem as though the legislature regarded that fact not merely as *prima facie* evidence, but as conclusive evidence, in support of the defense interposed.

But regarding this provision as intending merely to create a disputable presumption, it is nevertheless obnoxious to the Constitution, because the inference sought to be deduced from the fact that there has been an increase in rent is arbitrary, unreasonable, unnatural and extraordinary.

Although in *People* v. *Cannon*, 139 N. Y. 32, the power of the legislature to enact that where certain facts have been proved they shall be *prima facie* evidence of the main fact in question, was recognized as it has been in many other cases, it was nevertheless laid down in explicit terms that this rule is subject to important limitations. They were stated by Judge Peckham in these words:

> "The limitations are that the fact upon which the presumption is to rest must have some fair relation to or natural connection with the main fact. The inference of the existence of the main fact because of the existence of the fact actually proved must not be merely and purely arbitrary, or wholly unreasonable, unnatural or extraordinary, and the accused must have in each case a fair

> opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence and given such weight to the presumption as to it shall seem proper."

In *Mobile, Jackson & Kansas R. R. Co.* v. *Turnipseed*, 219 U. S. 35, Mr. Justice Lurton likewise recognized that the rule permitting the legislature to establish *prima facie* presumptions was subject to qualifications. He said:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed."

In *Bailey* v. *Alabama*, 219, U. S. 219, 239, the validity of a statute creating a presumption of this character was attacked both under the Thirteenth and Fourteenth Amendments. Without specifically holding the act there under consideration unconstitutional under the latter Amendment, it was declared to be in violation of the Thirteenth Amendment the reasoning of the Court, however, being equally effective when applied to the Fourteenth Amendment. Mr. Justice Hughes there said, with characteristic clarity:

> "*Prima facie* evidence is sufficient evidence to outweigh the presumption of innocence and

if not met by opposing evidence to support a verdict of guilty. 'It is such as, in judgment of law, is sufficient to establish the fact; and if not rebutted, remains sufficient for the purpose.' *Kelly* v. *Jackson*, 6 Pet. 622. * * *

"We cannot escape the conclusion that, although the statute in terms is to punish fraud still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt, and judging its purpose by its effect that it seeks in this way to provide the means of compulsion through which performance of such service may be secured. The question is whether such a statute is constitutional.

"This court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 749. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue; and where the inference is not purely arbitrary and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law. * * *

In this class of cases where the entire subject-matter of the legislation is otherwise within state control, the question has been whether the prescribed rule of evidence interferes with the guaranteed equality before the law or violates those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law. But where the conduct or fact, the existence of which is made the basis of the statutory presumption, itself falls within the

> scope of a provision of the Federal Constitution, a further question arises. It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the State may not in this way interfere with matters withdrawn from its authority by the Federal Constitution or subject an accused to conviction for conduct which it is powerless to prescribe."

The case just cited was sought to be distinguished in *People ex rel. Woronof* v. *Mallon*, 222 N. Y. 456, on the ground that it involved a violation of the Thirteenth Amendment. Nevertheless it distinctly laid down the principles applicable to the validity of such a presumption in so far as it might affect the due process clause. In the latter case the real point in controversy was whether the act compelled the relator to become a witness against himself. It in no manner sought to modify the limitations upon the rule laid down in *People* v. *Cannon* and *M. J. & K. R. R. Co.* v. *Turnipseed, supra.*

Applying the doctrine of those cases to the present statute, we contend that the presumption sought to be created is arbitrary and unreasonable. Under this provision the presumption is operable however small the increase may have been or whatever the circumstances under which the increase is made. It relates to an agreement entered into between a landlord and a tenant fixing the amount of rent to be paid. It applies even though the tenant may have proposed to pay an increased rental, even though he may have had abundant opportunity to rent other premises, even

though he may have been willing to pay more because of the fact that he regarded the premises more desirable than others previously occupied, and even though he may have left premises in which he paid more in order to occupy those which he thus preferred for occupancy. It applies to leases that are the result of the give and take of bargaining. It is further to be borne in mind that the agreement under which the tenant entered into possession may have been the first that he had ever made with the landlord against whose claim for rent he is defending. The mere fact that a tenant for the previous year had paid a lesser amount of rent gives rise to the statutory presumption.

At the time when the purchasing power of the dollar had been reduced to a marked extent, when labor, materials, supplies and services of every kind had increased in price and all market values had been enhanced, when the law of supply and demand was in full operation, with consequent increases in the cost of every imaginable convenience and commodity, when real estate values, interest rates and taxes had universally risen, a legislative declaration that an increase in rent was presumptively unjust, unreasonable and oppressive was in itself unreasonable and arbitrary. The amount of rent properly chargeable for the use of real property in a city of the first class was necessarily dependent on a multitude of elements, each involving expenditures and liability on the part of the landlord. The making of repairs involved contracts for labor and materials. The extent to which their cost increased is a matter of common knowledge. The supplying of heat involved the purchase of coal and the item of labor,

as well as the maintenance and reparation of the heating plant. The running of elevators included both classes of items; as is likewise true of janitorial services and the furnishing of gas and electricity. At the same time interest rates on mortgages and income taxes, insurance and general taxation were increasing.

No similar legislation was enacted with respect to the cost of labor and materials. The owner of real property alone was placed in the position of paying whatever might be charged for such services and materials and supplies as he required for the maintenance and operation of his property, and at the same time he was declared by this legislation to be presumptively guilty of making an unjust, unreasonable and oppressive agreement when he increased his charges for rent to the extent of a single dollar beyond the amount charged by him a year prior to the date of the agreement sought to be enforced.

Chapter 136 of the Laws of 1920, which was enacted less than six months before the present statute, provided that the statutory presumption would not operate unless the rent had been increased more than twenty-five per centum over the rent as it existed one year prior to the time of the agreement, and yet the same legislature that passed that act eliminated the twenty-five per cent. clause and declared any increase whatsoever to be presumptively unjust, unreasonable and oppressive. The practical effect of such a provision necessarily would be to invalidate a lease which provided for an increased rental unless the landlord could, on a trial before a jury, overcome this presumption by proving a negative, namely, that the agreement was not unjust, unreasonable and

oppressive. That would necessitate proof in justification of the terms of the contract, the giving of testimony as to what would be a fair return upon the property which was the subject of the lease. This in turn would give rise to proof as to a multitude of elements affecting the reasonableness of the rent. It might involve an issue as to each element of value. It might call for the giving of expert testimony by both sides; and the burden of proof would rest on the landlord. And yet this Court in a case involving the regulation of rates of a common carrier, (*People ex rel. N. Y. C. & H. R. R. Co.* vs. *Public Service Commission* (*supra*) declared that the burden of proof that an increase of rates was reasonable could not be cast on the railroad company. If such is the rule where the rates are to be fixed by an impartial commission, what is to be said of a law which permits the reasonableness of rental to be determined by a jury likely to be composed of men whose personal interest as well as natural sympathies would lead them to favor the tenant? In no case, as we have shown, would the landlord after running the gauntlet of this provision be enabled to recover more than the amount stipulated in the lease, even though he might be able to show that the rental value was greater than the stipulated rent.

If such a provision is enforceable as against a landlord, then similar legislation providing that a contract for labor at a daily wage exceeding that which prevailed on January 1, 1917, or on any other day that may be specified, or a contract for the sale of wearing apparel or foodstuffs at a price greater than that at which the same articles were sold one year or three years previously, or for the

sale of any other kind of property, whether real or personal, at a price exceeding that set forth in the statute, could in like manner be declared to be presumptively unjust, unreasonable and oppressive and therefore unenforceable. In any of the cases supposed the presumption sought to be created is abnormal and extraordinary. It takes into account but a single fact out of a multitude of more essential facts that have a controlling bearing on the proposition to be determined. The legislature declares that any variation from the rent of a year ago, in the direction of an increase, even though that rental may have been fixed under the terms of a contract entered into many years before, (in the present case two years before) is *prima facie* unlawful, even though the tenant deliberately agreed to pay the increased rental and was in every respect a person *sui juris*.

One is transported into an atmosphere of topsy turvydom when confronted by this provision. Ordinarily one who seeks to reform a written contract not only has imposed upon him the burden of proof, but he is obliged to satisfy the court beyond a reasonable doubt that the justice of the case is with him. Here the converse of that rule of reason and of justice is erected into an obstacle in the landlord's quest for justice.

The authorities on this subject are collated by Judge Parker in *Southard* v. *Curley*, *134 N. Y. 148*.

See also,

Christopher St. Ry. Co. v. *Twenty-third St. Ry. Co.*, *149 N. Y. 58*.

Johnstown Mining Co. v. *Butte & Boston Mining Co.*, *60 App. Div. 347*.

Here, however, the mere proof of a fact which, at the most, is one of many more interrelated important facts and which, standing alone, does not legitimately raise a doubt as to the reasonableness of the contract, not only shifts the burden of proof, but gives rise to a most onerous presumption against the party who is seeking to enforce the contract in strict accordance with its terms.

(g) The injustice and inequality of the principle sought to be created by this statute.

There has not been an article of food or of clothing or of prime necessity that has not during the past three years increased in price. Until recently there was a constant upward trend so that costs had in many instances trebled on the basis of pre-war prices. There has been no attempt on the part of our Legislature to apply the principle of the acts which we are now considering to contracts for the purchase of such essential commodities as milk, sugar, meat, bread, shoes and wearing apparel, or of lumber, hardware, brick and stone, cement, iron, or other basic materials, or of labor in any of its numerous forms. While shelter is undoubtedly necessary, food is indispensable, and in this climate clothing is equally essential.

If, therefore, the Legislature may say to the owner of a building devoted to private purposes, that he shall not be permitted to enter into a contract for the leasing of his property except on condition that the contract shall run the gauntlet of the courts and juries and that the amount that he shall be permitted to charge shall eventually be fixed by a court or jury, then it is difficult to understand why the Legislature may not say to the

farmer or to the grocer that, irrespective of the contract price at which he may sell to a customer milk, potatoes, wheat, or any other of his products, the purchaser may contest the reasonableness of the price and be limited in his payment to the sum that a court or jury may eventually determine to be the just and reasonable price. In like manner a tailor or shoemaker, or a manufacturer on a large scale of clothing or shoes, may have his contracts subjected to the same test. There is not a business conceivable, however private it may be, that could not with equal right be made dependent upon the action of the Legislature. All prices, all contracts, would have to stand or fall upon the vague test that the Legislature might prescribe in a statute modeled upon that now under consideration.

This legislation tends to lawlessness. Its fruits are now observed in the readiness with which merchants who entered into contracts for future delivery of merchandise by manufacturers, at fixed prices, are because of the recent business depression and consequent fall in prices, taking the law into their own hands, and are repudiating their agreements.

By this statute the State does not provide for the taking by it or by a corporation endowed with the right to take by eminent domain the property of the owner of real estate for a public purpose, for which alone private property can be taken, even by the sovereign (*Matter of Albany Street*, 11 Wend. 149; *Matter of Hopper* vs. *Britt*, 203 N. Y. 144), but it assumes to permit a private person to hold for his private use the property of his landlord without paying the compensation prescribed by the terms of the lease for such use. He is allowed to remain in possession,

to defy the title of his landlord, and to withhold payment until the court shall have finally decided whether the rent reserved was just and reasonable or not. Months may elapse after the tenant has refused to comply with the terms of his lease before there can be an adjudication upon the defense interposed. The tenant is only required under Section 6 to deposit with the clerk at the time of answering "such sum as equals the amount paid as rent during the preceding month or such as is reserved as the monthly rent in the agreement under which he obtained possession of premises." It is only one month's rent therefore that is to be deposited, and that may be "Such deposit shall be applied to the satisfaction of the judgment rendered or otherwise disposed of as justice requires." The landlord is thus to be kept out of his rent pending litigation. If, therefore, the litigation should continue for six months or a year before judgment is rendered, as is quite probable, the tenant during all that period would be enabled to defy his landlord and to withhold from him all rent except that deposited that may accrue during the pendency of the litigation. At the end of that period the tenant may be willing to seek pastures new, he may be financially irresponsible, and the landlord, though successful, would have sustained a serious loss.

As a matter of fact, the calendars of the courts are now overcrowded with litigation of this character, which cannot be expedited. Motions to place these cases on the short cause calendar are opposed and denied. In the New York Law Journal of January 6, 1921, appears a decision in *E. J. Realty Co.* vs. *Haggerty*, where the Court said:

> "Experience has demonstrated that causes for the recovery of rent where the issue of un-

> reasonableness of the amount has been raised *cannot be tried within two hours*, as the exercise of defendant's right to inquire into the items of plaintiff's bill of particulars *almost invariably* extends the trial beyond the period limited by the rule".

The *New York Times* of January 19, 1921, reported the proceedings of the Board of Municipal Justices of New York City. It was there stated that if the Justices assigned to the Borough of the Bronx were to handle landlord and tenant litigation exclusively it would take them five years to clean up the calendar, there being 16,000 untried cases.

By the coercive provisions of this statute the tenant is enabled to ruin his landlord, especially one who depends upon his rentals for the payment of the interest on his mortgages, of his taxes, and of his operating expenses. This legislation has become the vehicle of oppression, and the precedent that it would establish, if held to be constitutional, would be appalling.

Having now analyzed this legislation, we are prepared to point out its constitutional defects, and in doing so we refrain from multiplying citations that are applicable contenting ourselves with such decisions as closely resemble in important respects the case at bar.

I.—*This statute deprives the landlord of his liberty of contract and of his property without due process of law.*

As was said by Judge Denio in *People* v. *Smith*, *21 N. Y. 598*:

> "It would not be due process of law to appropriate the property of one citizen for the use of another, or to confiscate the property

> of one person or a class of persons, or a particular description of property upon some view of public policy, where it could not be said to be taken for a public use. * * * I do not believe that the people of the State can affect or impair the obligation of the social compact by adopting as a part of the organic law a provision which will permit of the taking of private property for a purpose which is essentially of private benefit and which has always been held to be such."

In *Matter of Tuthill, 163 N. Y. 133, 138*, the court went so far as to say that the property of one person or of one class of persons may not be taken for the benefit of other persons or of other classes of persons even under the power of eminent domain. In consequence of this decision, the Constitution was recently amended with respect to the drainage of private lands.

In fact, under the Constitution private property can only be taken for public use on making just compensation. It is not contemplated that private property shall be taken for private use.

In *Brewster* v. *Rogers Co., 169 N. Y. 73, 82*, Judge Cullen thus spoke on that proposition:

> "It is elementary law with us that private property can be taken only for public purposes, not for private use. * * * No one would seriously assert that a legislative enactment that authorized A to enter upon the farm of B without the latter's consent whenever he saw fit for the purpose of play, exercise or recreation, upon making compensation therefor to B, was constitutional. It would not help the matter if the statute gave every person in the community the same privilege in B's farm; the statute would still be unconstitutional. Yet that farm could unquestionably be taken as a park or common to be enjoyed by the community at large as a place for recreation, amusement or health.

> The distinction in principle between the two kinds of legislation lies just here. In the first case the easements sought to be acquired are private, and though every one might acquire such an easement, still they would remain in their aggregation of the same character as each one was in its severalty, that is to say, merely a number or bundle of private easements. As the easements would be private, the purpose for which they were acquired would be private. In the second case the easement would be in the public and, therefore, the purpose for which it is taken public."

See also:

Bradley v. *Degnon Contracting Co., 224 N. Y. 60, 71.*

Missouri Pacific R. R. Co. v. *Nebraska, 164 U. S. 403, 417.*

Chicago B. & Q. R. R. Co. v. *Chicago, 166 U. S. 226.*

What is true of the taking of property is equally true of the enjoyment of the incidents and attributes of property. In the case of real property, the rents, income and profits derivable from its holding are such attributes.

In *People ex rel. Manhattan Savings Institution* v. *Otis, 90 N. Y. 48*, Chief Judge Andrews succinctly gave expression to this thought:

> "Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provisions."

In *Wynehamer* v. *People, 13 N. Y. 378*, the court declared:

> "When the law annihilates the value of property and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the

plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power."

In the same case Judge Comstock said at page 396:

"Material objects, therefore, are property in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are, fundamentally, the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so, whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched. Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment."

In *Forster* v. *Scott, 136 N. Y. 577,* Judge O'Brien said:

"Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment, that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable and valuable in the title and possession."

These authorities were cited with approval in *Litchfield* v. *Bord, 186 N. Y. 80.*

In re Jacobs, 98 N. Y. 98, Judge Earl said:

> "All laws . . . which limit one in his choice of a trade or profession or confine him to work or live in a specified locality, *or exclude him from his own house,* or restrain his otherwise lawful movements, except as such laws may be passed in the exercise by the Legislature of the police power, are infringements upon his fundamental rights of liberty, which are under constitutional protection."

In *Ingersoll* v. *Nassau Electric R. R. Co., 157 N. Y. 463,* Chief Judge Parker said:

> "Salability is an essential element of property, and the destruction or the diminution thereof is a taking of property that cannot be done except through the exercise of the right of eminent domain or of the police power."

After citing a number of authorities, including *Roddy* v. *Brooklyn City & Newtown R. R. Co., 32 App. Div. 311,* he continues:

> "In the latter case the court had under consideration the question now before us, and Mr. Justice Hatch in delivering the opinion of the court well stated the conclusion necessarily resulting from his argument, as follows: 'The right or privilege to contract for its use with other railroads, and thereby derive a profit, was as much a part of its franchise as was the right to lay its tracks or operate its cars. This was a source of use which made its property and franchise valuble, and the corporation could no more be deprived of this right than the right of operating in any other respect as authorized by law.'"

In *People* v. *Hawkins, 157 N. Y. 7,* which involved a statute which required all goods made

by convict labor in any penal institution to be labeled "convict made" before being sold or exposed for sale, Judge O'Brien, declaring the act unconstitutional, said:

> "The scrubbing brush in question was beyond all doubt an article of property in which the defendant could lawfully deal. He is forbidden, however, by this statute, under all the penalties of the criminal law, from buying or selling or having it in his possession, except upon the condition that he shall attach to it a badge of inferiority which diminishes the value and impairs its selling qualities. * * * The validity of the law must depend entirely upon the exercise of the police power to enhance the price of labor by suppressing, through the instrumentality of the criminal law, the sale of the products of prison labor.
>
> "The citizen cannot be deprived of his property without due process of law. The principle embodied in this constitutional guaranty is not limited to the physical taking of property. Any law which annihilates its value, restricts its use, or takes away any of its essential attributes, comes within the purview of this limitation upon legislative power. The validity of all such laws is to be tested by the purpose of their enactment and the practical effect and operation that they may have upon property. A law which interferes with property by depriving its owner of the profitable and free use of it, or hampers him in the application of it for the purposes of trade or commerce, or imposes conditions upon the right to hold or sell it, may seriously impair its value, against which the Constitution is a protection. The fact that legislation hostile to the rights of property assumes the guise of a health law or a labor law will not save it from judicial scrutiny, since the courts cannot permit that to be done by indirection which cannot be done directly."

Liberty, it has been frequently held, includes the right to acquire property, and that means the right to make and enforce contracts in respect thereof.

Allgeyer v. *Louisiana, 165 U. S. 578.*
State v. *Loomis, 115 Mo. 307.*
Fisher Co. v. *Woods, 187 N. Y. 90.*

It has naturally been contended on behalf of the tenant that the rights of liberty and property are subject to the police power. In so far as that power may be validly exercised (*Wright* v. *Hart, 182 N. Y. 330; Ives* v. *South Buffalo R. R. Co., 201 N. Y. 271*), there can be no controversy. The question, however, recurs as to the limitations upon the police power. It is certainly subordinate to the essence of the great constitutional guaranties that we have invoked.

But for the fact that Mr. Justice Wagner in the elaborate opinion in which he follows the respondent's contention, has indicated a contrary view, as is quite natural when one considers his long and distinguished service in the Legislature, we would content ourselves with this statement. We are, therefore, constrained to quote from the controlling decisions on the subject.

There can be no doubt that the police power has long existed and that in recent years its scope has been somewhat extended. Nevertheless it is not superior, but subject to the Constitution. That should not for a moment be forgotten, if free government under our present system is to continue. What was said in *Matter of Jacobs, 98 N. Y. 98, 108*, referring to that power, is equally true today:

"The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however, broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges and private persons, and so far as it imposes restraints, the police power must be exercised in subordination thereto. Judge Cooley, speaking of the regulation by the legislature under the police power of the conduct of corporations holding inviolable charters, says: 'The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety and welfare of society; they must not be in conflict with any of the provisions of the charter, and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations; in fact, and not amendments of the charter in curtailment of the corporate franchise.'"

In the *Slaughter House Cases, 16 Wall, 36, 87*, Mr. Justice Field said:

"All sorts of restrictions and burdens are imposed under the police power, and when these are not in conflict with any constitutional prohibitions or fundamental principles, they cannot be successfully assailed in a judicial tribunal. * * * But under the pretense of prescribing a police regulation, the State cannot be permitted to encroach upon any of the just rights of the citizen which the Constitution intended to secure against abridgment."

In *Matter of Jacobs, supra*, Judge Earl further said (p. 110):

> "Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

See also:

> *Matter of Cheesbrough, 78 N. Y. 232.*
> *People* v. *Marx, 99 N. Y. 377.*
> *Litchfield* v. *Bond, 186 N. Y. 66.*

Mr. Justice Wagner in his opinion, at Special Term (*113 Misc. 538, 548*) quotes at length from *Lawton* v. *Steele, 152 U. S. 136*, of which he says that the doctrine relating to the police power is perhaps nowhere better stated. He ends his quotation, however, quite abruptly by omitting the

qualifications imposed on the doctrine. We will therefore supply the omission of the language of Mr. Justice Brown, which immediately follows the excerpt thus lauded because of its extraordinary pertinency to the present case. He says:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In *Ives* v. *South Buffalo Ry Co., 201 N. Y. 300,* referring to the police power Judge Werner says:

> "But it is a power which is always subject to the Constitution, for in a constitutional government limitation is the abiding principle, exhibited in its highest form in the Constitution as the deliberative judgment of the people, which moderates every claim of right and controls every use of power. * * * It covers a multitude of things that are designed to protect life, limb, health, comfort, peace and property according to the maxim '*Sic utere tuo ut alienum non laedas,*' but its exercise is justified only when it appears that the interests of the public generally, as distinguished from those of a particular class, require it, and when the means used are rea-

> sonably necessary for the accomplishment of the desired end, and are not unduly oppressive."

That liberty of contract and the right of property still exist in spite of the extension of the police power is shown by the decisions of this Court and of the Supreme Court of the United States which we regard as directly in point.

In *Adair* v. *United States, 208 U. S. 161*, the court was called upon to determine whether an act that made it a misdemeanor for an employer to require an employee or any person seeking employment as a condition of such employment to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association or organization; or to threaten any employee with loss of employment, or to unjustly discriminate against any employee because of his membership in such a labor corporation, association or organization, was in violation of the Fifth Amendment. The court held that it was, Mr. Justice Harlan saying:

> "While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the con-

ditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee."

In *People* v. *Marcus*, *185 N. Y. 257*, the Court of Appeals of New York in a carefully expressed opinion of Judge Chase following *National Protective Association* v. *Cumming*, 170 N. Y. 315, and *Jacobs* v. *Cohen*, 183 N. Y. 207, laid down the same doctrine.

In *Coppage* v. *Kansas*, *236 U. S. 1*, a Kansas statute declaring it a misdemeanor punishable by fine or imprisonment for an employer to require an employee to agree not to become or remain a member of any labor organization during the time of his employment, was likewise held to be unconstitutional. There Mr. Justice Pitney, following *Adair* v. *United States*, *supra*, said:

> "We are now asked, in effect, to overrule it; and in view of the importance of the issue we have re-examined the question from the standpoint of both reason and authority. As a result, we are constrained to reaffirm the doctrine there applied. Neither the doctrine nor this application of it is novel; we will endeavor to restate some of the grounds upon which it rests. The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with,

there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

"An interference with his liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supported as a reasonable exercise of the police power of the State. But, notwithstanding the strong general presumption in favor of the validity of State laws, we do not think the statute in question, as construed and applied in this case, can be sustained as a legitimate exercise of that power. * * * No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed a little reflection will show that wherever the right of private property and the right of free contract coexist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And since it is self-evident that unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

> We need not refer to the numerous and familiar cases in which this court has held that the power may properly be exercised for preserving the public health, safety, morals, or general welfare, and that such police regulations may reasonably limit the enjoyment of personal liberty, including the right of making contracts. They are reviewed in *Holden* v. *Hardy, 169 U. S. 366, 391; Chicago B. & Quincy R. R.* v. *McGuire, 219 U. S. 549, 566; Erie R. R.* v. *Williams, 233 U. S. 685;* and other recent decisions. * * * But, in our opinion, the Fourteenth Amendment debars the States from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment."

Coming directly to the crux of the argument presented in favor of this legislation, we are met with the contention that the State has the right to fix the charges to be made by the owner of private property for its use, on the theory that the public welfare may be thereby promoted. The authorities relied upon in support of this contention are *Munn* v. *Illinois, 94 U. S. 113; People* v. *Budd, 117 N. Y. 1, affirmed 143 U. S. 517; Brass* vs. *Stoeser, 153 U. S. 391; German Alliance Insurance Co.* v. *Lewis, 233 U. S. 389; Union Dry Goods Co.* v. *Georgia Public Service Corporation, 248 U. S. 372,* and *Producers Transportation Co.* v. *Railroad Commission, 251 U. S. 288.*

In view of the insistence that these decisions are controlling, we are constrained to consider them with some detail.

Munn v. *Illinois*, *supra*, involved a statute that undertook to regulate the charges of privately-owned grain elevators in the City of Chicago. There were at that time in the city fourteen warehouses especially adapted to the business. They were controlled by nine firms. The prices charged for their use were agreed upon by the several owners from year to year. The rates established were annually published. There was no competition between the several owners; together they enjoyed a monopoly. These elevators were necessary for the purposes of commerce and trade. They constituted a connecting link between the common carriers who delivered the grain at Chicago and received it for transportation from there. The railroads found it impracticable to own such elevators, and public policy forbade the operation of elevators by the common carriers. For that reason the Constitution of Illinois made it the duty of the Legislature to pass laws for the protection of producers, shippers and receivers of grain and produce. The business conducted at these elevators possessed all of the characteristics of the business of a common carrier. Every bushel of grain that came into Chicago paid a toll to the owners of the elevators, which was a common charge on all grain that passed through that gateway. As was said, the elevators stood in the very gateway of commerce and took toll from all who passed. The entire public therefore had a direct and positive interest in the business conducted by these elevators. Their business was, therefore, affected with a public interest. As was said by Chief Justice Waite:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use."

In the present case there is no such element. The plaintiff's property was not devoted to any public use. The various apartments constituted dwellings that were rented for private occupation to the several persons whom the owner was willing to accept as tenants. The general public had no concern with this property. The very fact that the defendant in the present case had a lease for the apartment occupied by him prevented the remainder of the public from making any use of the premises which he thus leased for the most private of all purposes—his home. Nobody else was concerned with them. Nobody else had a right to enter these premises without the defendant's consent.

In the opinion in *Munn* v. *Illinois* reference is made to the regulation of innkeepers, grist mills and the like.

So far as innkeepers are concerned they have from the earliest days been recognized as engaged in a public business. They are bound to furnish travelers with food and lodging, and they are, because of the public character of their business, subject to legislative regulation.

On the other hand, a boarding-house keeper is engaged in a private business; is, therefore, under no obligation to serve the public; is at liberty to choose his own guests, and to make special arrangements with them. Except so far as regula-

tions relating to health and morals are concerned he does not come within the regulatory power of the Legislature.

In respect to grist mills the same rules apply as in the case of inns. They are devoted to a public purpose. Their owners have enjoyed valuable privileges from the Legislatures with respect to the erection of dams and the flowage of land. In consideration of these privileges they are required to serve the general public and therefore come within the purview of the legislative power. This is likewise true with regard to the owners of bridges, ferries, and other similar public utilities. The distinction between them and the owners of private property designed for private uses has been uniformly observed.

People v. *Budd, supra*, in its main features, was similar to *Munn* v. *Illinois*. The statute fixed the maximum charges for receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses and for trimming and shoveling to the leg of the elevator in the process of handling grain by means of elevators, lake vessels or propellers, ocean vessels or steamships, and canal boats. Dealing with the statute, Judge Andrews said:

> "In determining whether the legislature can lawfully regulate and fix the charge for elevating grain by private elevators, it must be conceded that the use to which a man may devote his property, the price which he may charge for such use, how much he shall demand or receive for his labor, and the methods of conducting his business are, as a general rule, not the subject of legislative regulation. These are a part of our liberty, of which, under the constitutional guaranty, we cannot be deprived. We have no hesitation

in declaring that unless there are special conditions and circumstances which bring the business of elevating grain within principles which, by the common law and the practice of free governments, justify legislative control and regulation in the particular case, the statute of 1888 cannot be sustained. That no general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the prices of commodities or services, or interfere with freedom of contract, we cannot doubt. The merchant and manufacturer, the artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammelled by burdensome and restrictive regulations which, however common in rude and irregular times, are inconsistent with constitutional liberty."

After considering the exceptional nature of the business of a common carrier, the opinion proceeds (*p. 22*):

"There are elements of publicity in the business of elevating grain which peculiarly effect it with a public interest. They are found in the nature and extent of the business, its relation to the commerce of the state and country, and the practical monopoly enjoyed by those engaged in it. The extent of the business is shown by the facts to which we have referred. A large proportion of the surplus cereals of the country passes through the elevators at Buffalo and finds it way through the Erie canal and Hudson river to the seaboard at New York, from whence they are distributed to the markets of the world. The business of elevating grain is an incident to the business of transportation. The elevators are indispensable instrumentalities in the business of the common carrier. It is

scarcely too much to say that, in a broad sense, the elevators perform the work of carriers. They are located upon or adjacent to the waters of the state, and transfer from the lake vessels to the canal boats, or from the canal boats to the ocean vessels, the cargoes of grain, and thereby perform an essential service in transportation. It is by means of the elevators that transportation of grain by water from the upper lakes to the seaboard is rendered possible. * * * We rest the power of the legislature to control and regulate elevator charges on the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the canal, creating the business and making it possible, the interest to trade and commerce, the relation of the business to the prosperity and welfare of the state, and the practice of legislation in analogous cases. These circumstances, collectively, create an exceptional case and justify legislative regulation."

When the case reached the Supreme Court of the United States, where it was affirmed by a divided court, Mr. Justice Blatchford said (*pp. 544, 545*):

"In the actual state of the business the passage of the grain to the City of New York and other places on the seaboard would, without the use of elevators, be practically impossible. The elevator at Buffalo is a link in the chain of transportation to the seaboard, and the elevator in the harbor of New York is a like link in the transportation abroad by sea. The charges made by the elevator influence the price of grain at the point of destination on the seaboard, and that influence extends to the prices of grain at the places abroad to which it goes. The elevator is devoted by its owner, who engages in the business, to a use in which the public has an interest, and he must submit to be controlled by

public legislation for the common good. * * * Not only is the business of elevating grain affected with a public interest, but the records show that it is an actual monopoly, besides being incident to the business of transportation and to that of a common carrier, and thus of a quasi-public character."

In *Brass* v. *Stoeser, 153 U. S. 391,* the statute was one to regulate grain warehouses and the weighing and handling of grain and declare elevators to be public warehouses, but did not apply to elevators built by a person solely for the purpose of storing his own grain and not to receive and store the grain of others. Because of this qualification the validity of the statute was upheld on the doctrine of *Munn* v. *Illinois* and *Budd* v. *New York.*

In *German Alliance Insurance Co.* v. *Kansas, supra,* the business sought to be regulated was that of fire insurance. That was shown to be a business that had been regulated for many years in all parts of the country. It was carried on exclusively by corporations which derived their existence from the sovereign. Theirs was conceded to be a business affecting the public welfare. Insurance was looked upon as being in assimilation to a tax. A large part of the country's wealth, being subject to loss through fire, was recognized as being protected by insurance. This was regarded as a demonstration that the public had an interest in the business. After referring to these features, Mr. Justice McKenna said:

"To the contention that the business is private we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and con-

sequence beyond and different from that of the ordinary business of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositaries of the money of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times—certainly the sense of the modern world—is of the greatest public concern. It is therefore within the principle we have announced. * * * The principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become 'clothed with a public interest,' and therefore subject 'to be controlled by the public for the common good'."

Attention is also directed to the dissenting opinion of Mr. Justice Lamar, in which Chief Justice White and Mr. Justice Van Devanter concurred, as indicating the limitations on the power to fix prices, which were recognized, although deemed inapplicable, by the majority of the court to the subject of insurance for the reasons above shown.

Union Dry Goods Co. v. *Georgia Public Service Corporation, supra,* related to the fixing of rates to be charged by a corporation supplying electricity to the inhabitants of the City of Macon, which superseded lower rates agreed on in an existing time contract made previously between the company and a consumer. The supplying of electricity for lighting and power purposes was a public utility. The capital invested was devoted to a use in which the public had an interest. That necessarily justified rate regulation by the State in the exercise of the police power, and in consequence involved the right, as well as the duty, of making uniform rates. The case is, therefore, typical of that large class of cases involving rate regulation with respect to public service corporations.

Producers Transportation Co. v. *Railroad Commission, supra,* likewise related to such a corporation. The business conducted was that of the general transportation of oil through a pipe line. The right of way of this company had been acquired through eminent domain proceedings, permissible only under the State law where the condemnation was for a public use. The case therefore came within the principle applicable to transportation companies generally.

The distinction between that case and the present is, however, pointed out in clear terms by Mr. Justice Van Devanter (*p. 230*):

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, that is, to carry for the public, the State could not by mere legislative

> fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment. * * * On the other hand, if in the beginning or during its subsequent operation the pipe line was devoted by its owner to public use, and if the right thus extended to the public has not been withdrawn, there can be no doubt that the pipe line is a public utility and its owner a common carrier whose rates and practices are subject to public regulation."

There is nothing in *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, that will support this legislation. There was not even an intimation that the Corporation Commission was constitutionally empowered to establish rates for laundry work. An injunction was sought to restrain the Commission from entertaining complaints for a violation of the order fixing rates and to enjoin it from proceeding with the investigation regarding the cost of the service. The Supreme Court decided that the plaintiff was entitled to a temporary injunction restraining the enforcement of the penalties prescribed by the statute, which in effect prevented judicial review.

This Court has just declared the Lever Act unconstitutional. The decision rendered is the more noteworthy because it was enacted by Congress in the exercise of the war powers conferred by the Federal Constitution. No such powers are conferred on the New York Legislature. The acts of that State now under discussion cannot be upheld on the theory underlying much of the recent Con-

gressional legislation that would not be regarded as defensible but for the fact that it rests on the war power, which by the express terms of the organic law is made exceptional.

In *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 256, it was held that a corporation that was engaged in operating taxicabs for the accommodation of the public at railroad stations and hotels was engaged in a public business and subject to regulation. It was at the same time decided that, as to that portion of the business of the corporation which consisted mainly in furnishing automobiles from its central garage on orders by telephone, the regulation was not authorized. Mr. Justice Holmes thus expressed the views of the court:

> "Although I have not been able to free my mind from doubt the Court is of opinion that this part of the business is not to be regarded as a public utility. It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that consideration is not conclusive, German Alliance Ins. Co. *v.* Kansas, 233 U. S. 389, 407, it is assumed that such a calling is not public as the word is used. In the absence of clear language to the contrary it would be assumed that an ordinary livery stable stood on the same footing as a common shop, and there seems to be no difference between the plaintiff's service from its garage and that of a livery stable."

Clark v. *Nash*, 198 U. S. 361, is also cited. All that the Court there decided was that whether a State statute permitting condemnation by an individual for the purpose of obtaining water for his land or for mining is or is not a condemnation for public use, depends upon considerations relating to the situation of the state and its possibilities for agricultural and mining industries. There was no pretense that property could be taken without compensation. The sole question was as to whether the proposed taking came within the power of eminent domain.

Strickley v. *Highland Boy Gold Mining Co.*, 200 U. S. 527, was a case of the same character and was likewise dependent on the question as to whether the use to which the property sought to be condemned was to be put was a public use.

Schmidinger v. *Chicago*, 226 U. S. 578, merely involved the question as to whether an ordinance, enacted under express legislative authority, fixing standard sizes of bread loaves, was valid. That was regarded merely as an exercise of the police power intended to prevent deceit, and practically of the same character as that of fixing weights and measures. It did not undertake to go beyond that point.

Rast v. *Van Deman & Lewis*, 240 U. S. 342, which related to a special tax on trading stamps, proceeded on the theory set forth by Mr. Justice McKenna at page 365 as follows:

> "The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence.

> This may not be called in an exact sense a 'lottery,' may not be called 'gaming'; it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry, a matter of inquiry and of judgment that it is finally within the power of the legislature to make."

In *People ex rel. Armstrong* v. *Warden*, 183 N. Y. 226, the validity of certain provisions of the employment agency act was considered. It was held that in order to prevent frauds and to suppress immorality it was lawful for the legislature to regulate the keeping of employment agencies. The license fee imposed by the statute was the sum of $25 annually in cities of the first and second class, to which alone the act related. The legislation clearly came within the police power of the State. Judge O'Brien said:

> "The legislature had the right to take notice of the fact that such agencies are places where emigrants and ignorant people frequently resort to obtain employment and to procure information. The relations of a person so consulting an agency of this character with the managers or persons conducting it are such as to afford great opportunities for fraud and oppression, and the statute in question was for the purpose of preventing such frauds and, probably, for the suppression of immorality."

The limitation of the power of the Legislature to regulate the compensation of employment agencies was fully considered in *Adams* v. *Tanner*, 244 U. S. 590.

Legislation similar to the present has recently been passed upon by the Court of Appeals of the District of Columbia and has been declared uncon-

stitutional, although it was avowedly predicated upon the war powers conferred on Congress. We refer to *Hirsh* v. *Block*, *267 Fed. Rep. 614*.

In *Stell* v. *Mayor and Aldermen of Jersey City*, *111 Atl. Rep. 274*, the Court held to be invalid a resolution, passed under the authority of the Walsh Commission Government Act, which permits the city to pass ordinances necessary for the protection of life, liberty and property and to preserve and enforce the good government and general welfare, order and security of the city. The resolution authorized the director of revenue and finance to investigate all cases "where unscrupulous owners have demanded unconscionable sums of money for rent, in many instances beyond the ability of tenants to pay, thereby resulting in innumerable proceedings to dispossess against the tenants, whereby families, many of them with children, will be without shelter unless instant means are taken to meet the situation." He was authorized to disburse so much money as might be necessary in the defense of all such cases, including the original deposit required for a jury trial and the retaining or employing of such legal or other assistance as he may need in the defense of such cases. Mr. Justice Swayze epigrammatically said:

> "No doubt it is desirable that there should be houses for all citizens, but they cannot be provided legally by using without leave or confiscating the property of house owners. Housing can only be provided either in the ordinary commercial way or by private charity."

Equally applicable are the decisions in *Collister* v. *Hayman*, *193 N. Y. 250*, *People ex rel. Burnham*

v. *Flynn*, *189 N. Y. 180*, *Woolcott* v. *Shubert*, *217 N. Y. 212*, and *People* v. *Newman*, *109 Misc. Rep. 622*, in all of which it was held that a theatre is not governed by the rules which relate to common carriers or other public utilities and that the owners cannot be controlled as to their rates, nor can they be compelled to admit the public generally or be prevented from arbitrarily excluding any person whom they may see fit to exclude.

On March 1, 1921, Governer Miller, recently one of the ablest members of the New York Court of Appeals, vetoed a bill passed by the Legislature which undertook to determine the price chargeable by theatre ticket agencies on the sale of tickets. In his message he unqualifiedly sanctioned the reasoning of the opinion in *People* vs. *Newman* (*supra*).

Many other cases might be cited as illustrating the proposition that statutes undertaking to fix the prices to be charged by private persons for services rendered or property sold cannot be sustained.

Brazee v. *Michigan*, *241 U. S. 340.*
Adams v. *Tanner*, *244 U. S. 590.*
A. M. Holter Hardware Co. v. *Boyle*, *263 Fed. Rep. 134.*
Fisher Co. v. *Woods*, *187 N. Y. 90.*
Ex parte Wickey, *144 Cal. 234.*
State v. *Fire Creek Coal & Coke Co.*, *33 West. Va. 188.*

Light is shed on the constitutional clause that we are considering by the provisions of Sections 11 and 13 of Article I of the Constitution. The former abolished all feudal tenures of every description with all their incidents "saving, how-

ever all rents and services certain which at any time heretofore have been lawfully created or reserved." The latter declares hat "no lease or grant of agricultural land, for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid."

It was deemed necessary to embody this prohibition in the Constitution, evidently because it was believed that the Legislature did not otherwise served." The latter declares that "no lease or the right of an owner of property to fix by contract the terms and conditions upon which he would let his property.

In closing this branch of the argument we venture to advert to a part of the opinion of Mr. Justice Wagner in *Ullman Realty Co.* v. *Kintara Tamur* (*113 Misc., 538, 556*) that illustrates the unsoundness of his position. There is to be found the extraordinary suggestion that in the absence of an agreement for a renewal of a lease the right to such renewal nevertheless exists. In support of this startling proposition *Mitchell* v. *Reed*, 61 N. Y. 123, is cited. As is well known, that case merely held that one member of a copartnership, cannot, during its existence, without the knowledge of his copartners, take a renewal lease for his own benefit of premises leased by the firm and that such lease enures to the benefit of the firm. The passage which purports to be a quotation from the opinion in that case is in reality taken from the argument of Sir Francis Hargrave in *Lee* v. *Vernon*, 5 Brown's Par. Cas. 10. It is somewhat distorted, as quoted, important qualifying parts being omitted. Read in its entirety it merely shows that it referred to two kinds of cases only, both

involving trust or quasi-trust relations as well as the element of fraud, imposition, misrepresentation and unfair practice, and that these cases held that one occupying the relation indicated obtaining a renewal lease under such circumstances would be accountable for the lease to the person for whom the lessor had supposed the new lessee to have acted. In all of these cases the owner of the property not only was ready to execute a renewal lease, but had in fact done so believing that the tenant for whose benefit the landlord intended to execute it had approved of its execution. It would make a lawyer of the old school rub his eyes in astonishment when confronted with such a perversion of a familiar doctrine as that evidenced by the passage that we are now considering.

Mr. Justice Wagner also refers in the same connection (*113 Misc. 556*) to *Banks* v. *Haskie*, 45 Md. 207. It has no possible application here. It related to property leased for periods of ninety-nine years with privilege of renewal, if exercised within the term of the lease, in perpetuity. The Court granted relief against a default involving forfeiture of an existing contractual right.

Some of our opponents have indulged at some length in citations from historians, decisions and statutes dealing with conditions in European countries, as e. g. in Ireland and Scotland. They have also referred to alleged *responsa* of rabbis rendered in mediaeval times, in their capacity as arbitrators. These passages from the history of other countries, whose organic law differs fundamentally from ours have no application here, where our legislation is necessarily governed by our written Constitutions. Nor are *responsa* ren-

dered in the exercise of an ecclesiastical as distinguished from a judicial function by rabbis, who were intent upon the avoidance of conflict among members of the synagogue, of the slightest moment. The very fact that the Jews, in the days when these arbitraments took place, could not own real property of itself indicates how far afield these alleged precedents are apt to lead one.

Nothing is clearer under our jurisprudence than that the Legislature cannot carve out of existing estates, new estates, *in invitum*. It cannot confer on a tenant an equitable lien or charge against the owner's title, to take effect on the expiration of the tenancy. That would be confiscation, pure and simple. It would create the astounding doctrine, once a tenant, forever a tenant. What becomes of vested rights under such a theory? What becomes of property? The theory of a "tenant right" such as that sought to be imported into our land tenures by means of legislation has never gained a foothold here, and is foreign to our institutions as it is opposed to our Constitutions.

After all, as was said by Judge Werner in *Ives* v. *South Buffalo Ry. Co., 201 N. Y. 287:*

> "Under our form of government, however, courts must regard all economic, philosophical and moral theories, attractive and desirable though they be, as subordinate to the primary question whether they can be moulded into statutes without infringing upon the letter or spirit of our written Constitutions. In that respect we are unlike any of the countries whose industrial laws are referred to as models for our guidance. Practically all of these countries are so-called constitutional monarchies in which, as in England, there is no written Constitution and the Parliament or lawmaking power is supreme. In our country the Federal and State Consti-

tutions are the charters which demark the extent and limitations of legislative power; and while it is true that the rigidity of a written Constitution may at times prove to be a hindrance to the march of progress, yet more often its stability protects the people against the frequent and violent fluctuations of that which, for want of a better name, we call 'public opinion.' "

II. Assuming, but not conceding, that the taking of private property for housing purposes may be permitted for a public purpose, it can only be done upon making just compensation and in the manner provided by the Constitution. These conditions have not been complied with in this statute.

What has been here attempted is to take from the plaintiff the possession of his own property and to give it to the defendant on terms other than those agreed upon in the lease executed by the parties. The fixing of the rent in the manner provided in the statute does not conform with the Constitutional requirement and is devoid of the fundamental safeguards. The taking is not by the public or by a corporation exercising public functions and endowed with the right to take by eminent domain. The compensation is not just. It is intended to be less than that agreed upon by the parties. Its fixation proceeds upon the presumption that the amount agreed upon by the parties is unjust, unreasonable and oppressive. The burden of proof is imposed upon the owner of the property. The elements of value set forth in the statute are erroneous and the real elements are ignored.

III. The statute denies to the plaintiff the equal protection of the laws.

The recital in Section 1 refers to the congested housing conditions occasioned by the rents exacted by landlords as the evil to be remedied. In Section 9 it declares that the act "shall not apply to a room or rooms in a hotel containing one hundred and twenty-five persons, or more, or to a lodging house or rooming house occupied under a hiring of a week or less." There are many hotels and lodging and rooming houses of both descriptions in the localities to which this act relates.

By Section 10 it is provided that the act "shall not apply to a new building in the course of construction at the time this amendment takes effect or commenced thereafter."

Nor does the act refer to any buildings occupied for commercial, manufacturing or other business purposes, although it is notorious that rents have been enhanced as to such properties to an extent even greater than it has in respect of property devoted to dwelling purposes.

Although it is recognized in the report of the Legislative Committee and in the Message of Governor Smith that the housing problem is one that exists in all cities of the State, by its express terms this act is limited in its operaton to "premises in a city of the first class or in a city in a county adjoining a city of the first class occupied for dwelling purposes." This excludes from the purview of this legislation all cities of the second and most of the cities of the third class.

Whilst the Legislature has undoubtedly the power to classify the subject-matter with which it may seek to deal, such classification must be rea-

sonable and may not be arbitrary and discriminatory. We contend that in the respects shown this act offends against the principle of equality.

Yick Wo v. *Hopkins*, 118 U. S. 356, 369.
Gulf C. & S. F. R. Co. v. *Ellis*, 165 U. S. 150.
Cotting v. *Kansas City Stock Yards*, 183 U. S. 79.
Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540.
Dobbins v. *Los Angeles*, 195 U. S. 237.
Merchants, &c. Bk. v. *Pennsylvania*, 167 U. S. 461, 463.
F. S. Royster Co. v. *Virginia*, 253 U. S.
Matter of Pell, 171 N. Y. 48.
Peo. ex rel. Farrington v. *Mensching*, 187 N. Y. 8.

IV. The act impairs the obligations of a contract.

Prior to the passage of this act the plaintiff and the defendant had entered into a lease at a fixed rental for a term of two years beginning October 1st, 1920. On September 27, 1920, the Legislature declared this lease presumptively unjust, unreasonable and oppressive because it increased the rent previously received by the plaintiff for these premises, and permitted the defendant to interpose this claim as a defense to an action for the rent stipulated in the lease.

That this tends to nullify the contract between the parties and permits a court or jury to create a different contract from that which the parties agreed upon is self-evident. It requires no argu-

ment to demonstrate that this constitutes an impairment of the obligation of the contract.

Green vs. *Biddle*, 8 Wheaton 1, 17, 84.
Bronson vs. *Kinzie*, 1 How. (U. S.) 310.
Walker vs. *Whitehead*, 16 Wallace 314.
Williams vs. *Duffy*, 96 U. S. 176.
Edwards vs. *Kearzey*, 96 U. S. 595.
Effinger vs. *Kennedy*, 115 U. S. 566.
Barnitz vs. *Beverly*, 163 U. S. 118.
Oshkosh W. W. Co. vs. *Oshkosh*, 187 U. S 437.
Bradley vs. *Lightcap*, 195 U. S. 24.

It is, however, argued that the lease which plaintiff is seeking to enforce although executed in May, 1920, was entered into subsequent to the passage of Chapter 136 of the Laws of 1920, which Chapter 944 of the Laws of 1920 purports to amend. An examination of both of these acts shows that although they purport to deal with the same subject, the present act operated as a repeal of the former. It reserves no defenses that may have arisen under Chapter 136. It makes wide-reaching changes. Section 1 of Chapter 136 contained the exception that the act did not apply to "a room or rooms in a hotel, lodging house or rooming house." That exception was eliminated and Section 9 of Chapter 944, though dealing with a room or rooms in a hotel, and with lodging houses and rooming houses, as has been shown above, does so in an entirely different manner. In this respect Chapter 136 accentuates the discriminatory features of the legislation. Section 2 of Chapter 136 provided that an increase of more than 25% in the former rent created the presumption that the lease was unjust, unreasonable and

oppressive. Chapter 944 omits the qualification of 25% and gives rise to the presumption if there has been any increase in the rental. Sections 2, 5, 6, 7 and 8 of Chapter 944 are not to be found in Chapter 136. Whilst we contend that the earlier act is subject to the same constitutional objections as those made to the latter, it is evident that the former was found unworkable and was, therefore, superseded.

II.

The fact that the act under review recites that it is based on the existence of a public emergency does not validate it, if its provisions are violative of the Constitution.

In one sense every new law passed by the Legislature springs from a public emergency real or fancied. The numerous amendments to the Penal Law or to the General Laws of the State annually proposed or enacted illustrate this. The Constitution recognizes no distinction between laws claimed to deal with an emergency and those as to which no such claim is made. The phrase is not to be found in the organic law. However great the asserted emergency, it would not warrant a disregard of the charter of our liberties embodied in the Bill of Rights of the State Constitution and in the Fourteenth Amendment of the Federal Constitution, or an infraction of any other of the safeguards contained in our fundamental law. If this were not the fact and the legislative declaration of the existence of an emergency would have to be regarded as conclusive

evidence of the fact, as is claimed by the proponents of the laws under discussion, then the Constitution would be effectually repealed and the power of the Legislature would be freed from all limitations.

The very thought that a State Legislature should undertake to suspend or repeal during the pendency of a pretended emergency a provision of the Federal Constitution, whose command is and must be continuously operative, is startling in its incongruity.

It may well be asked: What constitutes an emergency? When does it change from the acute to the chronic stage? And what happens when it becomes chronic? How long may an emergency continue? Is it to be for one, or five, or ten years? How is the existence of an emergency to be ascertained or tested? How is its cessation to be determined? What would occur if it should cease before the statutory time limit has been reached? How is it to be distinguished from hysteria? When and for how long a time may the constitutional guarantees be suspended? In other words, when is a Constitution not a Constitution?

Here, the Legislature by providing that the act is to remain in force until November 1, 1922, looks forward to a date when the emergency is to terminate. Why that date rather than November 1, 1932, does not appear. As will be shown under Point III the housing problem will certainly not be solved by this legislation. All that is done to meet the so-called emergency is to deal destruction to the landlords by performing a capital operation.

A fancied or even a real public emergency does not suspend or repeal the Constitution even tem-

porarily. The removal of its protection for a day is an attack upon liberty. One day may follow another until the organic law totally disappears and the guaranties of liberty have vanished. Here the Legislature arbitrarily declares that the alleged emergency is to continue until November 1, 1922. To measure its duration in advance is clearly an arbitrary act, which negatives the existence of an emergency. The fact that congested housing conditions exist today may be equally true in five or ten years, or fifteen years, hence. Rents, prices and wages have always been, and will, of necessity, continue to be, regulated by the law of supply and demand, and any legislation that seeks to ignore its operation must of necessity be futile. At all events, whatever may be the rule with regard to public utilities, to subject private property to the same rule puts an end to private ownership.

In *ex parte Milligan*, 4 Wallace 2, 121, decided in 1866 immediately after the Civil War, the argument of necessity arising in time of war had been urged in support of the proposition that in time of war the right of trial by jury could be suspended. Mr. Justice Davis, however, said:

> "All other persons (those not in the army or navy) citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance and cannot be frittered away on any plea of state or political necessity. When peace prevails and the authority of the government is undisputed, there is no difficulty in preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes

it otherwise; *but if society is disturbed by civil commotion—if the passions of men are aroused and the restraint of law weakened, if not disregarded—these safeguards need and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty consecrated by the sacrifices of the Revolution.*"

In *Wilson* vs. *New*, 243 U. S. 376, Justices Pitney and Van Devanter said that "an emergency can neither create a power nor excuse a defiance of the limitations upon the powers of the Government."

See also *Effinger* vs. *Kenney*, 115 U. S. 566, 572, 574.

So far as our jurisprudence indicates, it has never been held that an emergency real or fancied will justify a disregard of the Constitution. Property may be destroyed in a case of "immediate or overwhelming necessity" to prevent the spread of a fire or the ravages of a pestilence, but as was pointed out by Judge Comstock in *Wynehamer* vs. *People*, 13 N. Y. 401, 402, that right existed at common law, and in New York has since 2 R. L. 1813, p. 368, § 31, been regulated by statute. It has, however, never been extended as is now sought to be done even where the public health may be involved.

Matter of Cheesebrough, 78 N. Y. 237.

Where property is destroyed to prevent the ravages of a conflagration it must be property in the path of the flames and not such as is remote from the scene of danger. The destruction is for

the benefit of the entire public, because the danger threatens all. Here, however, all landlords within the cities to which the act is made applicable are placed within the ban of the Legislature. All leases are affected. All are presumptively unjust, unreasonable and oppressive if the rent reserved therein is increased beyond that of a year ago. The landlords as a class are the objects of the legislative dynamite. The tenants as a class are made the beneficiaries. And withal the mooted problem of housing remains unsolved; the remedy employed not only does not stay the conflagration or cure the emergency, but only adds fuel to the flames, and threatens the very institution of property everywhere.

III.

Not only do the statements contained in the report of the Legislative Committee and in the message of Governor Smith, relied upon in support of this legislation, fail to justify it, but in most material respects they are contrary to the facts, and the theories therein propounded if pursued would inevitably aggravate the dearth of housing accommodations to which attention is directed.

While it is undoubtedly true that the report of a legislative committee is a competent source from which to discover the meaning of the language employed in a statute, the only purpose for which the use of such reports has been hitherto sanctioned has been to determine the scope of the stat-

ute that may have been passed on the strength of such report. It cannot be resorted to for the purpose of construing it contrary to its plain terms, and we submit that its conclusions, which are either without supporting facts or are contrary to the facts, can no more be deemed conclusive when the validity of the legislation is attacked than can a declaration within the body of it, by which it is sought to be justified.

Binns v. *United States, 194 U. S. 495.*
Pennsylvania R. R. Co. v. *International Coal Co., 230 U. S. 199.*
Wolcott v. *Shubert, 217 N. Y. 212, 221.*

Although the report of the Joint Legislative Committee on Housing and the message from Governor Smith referred to "exorbitant increases of rent" and to "rent profiteering," neither the report nor the message contains any statement of facts showing that the rents charged were in excess of rental value or enabled the landlords to realize an exorbitant profit. The mere statement of a conclusion, couched in rhetorical terms, in a public document, cannot be regarded as evidence of a fact.

The Committee had no difficulty in presenting facts bearing on the cost of labor and materials, from which was deduced the conclusion that building had ceased to a great extent because of the prohibitive cost. On page 10 of the report appears a table showing that the daily wage of carpenters, bricklayers, plumbers, painters and laborers had between 1913 and 1920 increased 100%, and in some instances 150%. On page 14 of the report is a tabular statement showing that the

prices of basic building materials, such as lumber, brick, cement, lime, lath, glass and roofing, had increased more than 250% above their pre-war level. The effect of these increases on building operations is illustrated by the following statement from page 10 of the report:

"Standard City Schools of the same size and type of construction.

March, 1915, Public School	93 cost	$257,600
March, 1919, Public School	129 cost	463,916
March, 1920, Public School	181 cost	822,000."

There has been no legislation which would permit a court to require a laborer to work, or a maaterialman to furnish building supplies, at pre-war prices, or to disregard contracts entered into for labor or building materials, and to determine what a workingman or a vendor of supplies shall be required to accept. Nor would it be seriously asserted that such a statute could be enacted under the Constitution, even though the Statute of Laborers, enacted in the reign of Edward III and supplemented by another statute passed in the reign of Elizabeth, undertook to tyrannize over the workingman by limiting the amount of his compensation and prescribing the clothes that he should wear. Thus a haymaker was to receive a penny a day, a mower of meadows at the rate of five pence an acre, a master carpenter a daily wage of three pence and a journeyman carpenter of two pence, a master mason four pence and a journeyman mason three pence "without meat or drink." (*Stickney, State Control of Trade and Commerce, pp. 15-35.*)

The classic language of Judge Earl in *Matter of Jacobs, 98 N. Y. 114,* comes to mind because of its appropriateness and statesmanlike vision:

"Such legislation may invade one class of rights today and another tomorrow, and if it can be sanctioned under the Constitution, while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry and cause a score of ills while attempting the removal of one."

Before considering the report of the Joint Legislative Committee it will be useful to consider another contemporary official document dealing with the housing situation.

In the report of the Housing Committee of the Reconstruction Commission of the State of New York, of which Judge Elkus, subsequently appointed as a Judge of the Court of Appeals, was the Chairman, to Governor Smith, who appointed it, are to be found the following illuminating remarks:

"After a thorough study, which is outlined in this report, a majority of the Housing Committee has reached the conclusion that no temporary solution will serve to meet our present housing difficulties. To supply that need will take years, during which the shortage creating the emergency will continue to exist. * * * To legislate against rent raising will not help to supply the need of more housing. * * * Legislation, temporarily postponing the suffering of the dispossessed, is desirable. It

serves as does arbitration between tenant and landlord to ameliorate the condition of some of the victims of the present emergency. These do not help in the slightest degree to meet the real present housing needs. * * * After a lengthy study, we have concluded that the fundamental causes of the present housing crisis are no different than the causes of the evil housing conditions that have long existed in this State. The two problems are essentially the same. The present crisis is the result of past tendencies. * * * It is economically unprofitable now, it has been economically impossible for many years past, to provide a large part of the population of the State with decent homes according to American standards of living."

This report is dated March 26, 1920, and was transmitted by the Governor to the Legislature in a message bearing like date. On page 74 is to be found the following suggestive observation:

> "*Rent regulating and landlord baiting are at present the most popular indoor and outdoor sports.*"

The report includes a plan, but makes no reference whatsoever to the passage of rent laws, and makes no recommendation on the subject.

The Committee then proposed a number of measures, none of which included such legislation as that now under consideration. It provided for the appointment of local housing boards to aid each locality in meeting the immediate pressing need for sufficient homes and to study means of lowering the cost of housing through the better planning and construction of homes; the enactment of a constitutional amendment permitting the extension of State credits on a large scale and at low rates of interest to aid in the construction of moderate priced homes; the exemption of the bonds of the State Land Bank from State and

Federal taxation; and the passage of an enabling act permitting cities to acquire and hold or let vacant lots, and, if necessary, to carry on housing operations.

In like manner the message of Governor Smith made a number of recommendations, including tax exemption for a period of years of newly constructed housing accommodations; the exemption of mortgages from the provisions of the State income tax; the requirement that savings banks and insurance companies make their funds available by loaning them on real estate mortgages; the exemption of funds of the State Land Bank used for the building of homes from taxation; the leasing of State property for housing purposes, the elimination of combinations formed for the purpose of increasing the prices of building materials, and the establishment of a wide-reaching policy for permanent housing through a system of State credits or otherwise. He was, however, constrained to say:

> "The question of stimulating building growth becomes a very practical one because of the fact that the cost of building operations has trebled since 1915. Building at this time is considered an unprofitable field and money will not enter it, nor can it be forced into it by law, but we may be able to offer an inducement to capital to come back into the field and building may be resumed in a natural way if the State can find some way to offset the increased cost."

In the face of this diagnosis and prognosis by Governor Smith and the Reconstruction Commission, endorsed by the Joint Legislative Committee on Housing (Report, pp. 17-21), that the conditions referred to were due to an insufficiency of housing accommodations and that the only practical remedy was to stimulate the building of more

houses, the recommendations for a constructive policy were not only disregarded, but the bills enacted, including that now under consideration, only tend to accentuate the difficulty of the problem by discouraging the building of houses, because the owners of realty who are asked to embark on new building ventures are confronted with the menace of confiscation if this legislation is declared to be in conformity with the organic law.

We now come to a consideration of the various statements contained in the report of the Joint Committee on which respondents rely.

(1) It is contended that an emergency has arisen with respect to the housing of the inhabitants of all of our cities. The legislation, however, is practically limited to the City of New York. The Committee, in its report dated September 20, 1920, estimates that there is a shortage of 100,000 homes in the City of New York, which means that from 300,000 to 500,000 inhabitants are not adequately housed. There is no reference to any official statistics in support of this estimate, nor is there any testimony that would warrant it. Certainly nobody has been compelled to live upon the street or in open places. There has been no diminution in the accommodations for travelers or transient visitors. Everybody seems to have a roof over his head. Nor is there any evidence of overcrowding.

(2) The suggestion that the public health is affected is met by the vital statistics published by the Department of Health, which show that in 1919 the rate of death per 1,000 of inhabitants in the City of New York was 12.39, more than 4 points less than in 1918 and considerably less than in any previous year in the history of the city.

The weekly bulletin of the Department of Health of the City of New York, issued on November 27,

1920, covering the first ten months of the year, contains the following statement:

> "The health of the city, as a whole, during the first ten months of the year has been exceptionally good, showing not only a decrease in the death rate, based upon every thousand persons living in the city, but also a decrease in the absolute figures of death; there having been 62,648 deaths, and a death rate of 12.24 per 1,000, reported during this period, as compared with 63,871 deaths, and a death rate of 12.72 during the corresponding period of 1919, a decrease of 1,223 deaths, and of .48 of a point, in the death rate."

The report of the Health Department for the entire year 1920, as compared with the entire year of 1919, as published in the *New York Times* of January 1, 1921, makes even a better showing. It is that the death rate for 1920 was 11.93 for each 1,000 of the population as against 12.39 for the entire year 1919; the total number of deaths for 1920 being 73,249 as compared with 74,433 deaths in 1919, notwithstanding the increase in population during 1920.

These were not mere estimates but official reports based on actual records. Nor are they private letters written to sustain a thesis.

(3) The report of the Legislative Committee estimates the shortage of homes in New York State to be approximately 100,000. It is not stated how this shortage is distributed through the State, or to what extent it exists in cities of the first class to which the statute now under discussion applies. In 1910 there were many unoccupied apartments in the City of New York. Since then there has been constructed not only a large number of new habitations, not only flats, tenements and apartment houses, but also one and two family houses. In addition to this there has been

erected a large number of non-housekeeping apartments, hotels, apartment hotels and private houses.

The City of New York maintains in each of the Boroughs a Bureau of Buildings. Each bureau keeps a record of buildings constructed, demolished and converted. A careful examination of these official records has been made and the following summary prepared from them, which shows that the estimate of the Legislative Committee with respect to housing accommodations, so far as they apply to cities of the first class, is entirely erroneous:

SUMMARY OF NEW HABITATIONS CONSTRUCTED IN CITY OF NEW YORK (5 BOROUGHS) 1910-1919 INCLUSIVE.

(*New* Accommodations in Hotels, Apartment Hotels and Converted Private House Not Included.)

Number of New Apartments and Flats Constructed	203,710	
Number of New Habitations in 1 and 2 Family Houses	72,646	
TOTAL NUMBER OF NEW HOUSING ACCOMMODATIONS		276,356
Deduct		
Number of Flats and Apartment Suites Demolished and Converted to Business	32,167	
Number of Habitations Demolished and Converted to Business in 1 and 2 Family Houses	6,074	
TOTAL NUMBER OF HABITATIONS DEMOLISHED AND CONVERTED		38,241

Net Increase of Habitations in Tenements and 1 and 2 Family Houses (1910-1919 Inclusive)	238,115
Which Accommodate (at the rate of 4 persons each) Number of Persons...	952,460
Population City of New York—1920 U. S. Census	5,620,048
Population City of New York—1910 U. S. Census	4,766,883
Ten Year Increase in Population...	853,165

Notes—The foregoing figures prove that the increase in habitations from 1910-1919 on the basis of four persons to every habitation are sufficient to house the increase of population in that time, and to provide housing accommodations for at least 100,000 additional persons.

It will be noted that no factory of occupancy was employed in connection with the habitations in existence in 1910. The habitations in existence in 1910, together with new habitations erected thereafter equivalent in number to those demolished in the ten year period, were assumed to adequately house 4,766,883, equal to the number of people living in the City in 1910.

The rate of occupancy factor affects only the 238,115 habitations constituting the net increase of contruction over demolitions and conversions in the period from 1910-1920. The occupancy factor adopted, viz., 4, is ultra-conservative. The correct factor is probably 5, and if this is so there are accommodations for 238,115 additional persons (1 per habitation).

The figures set forth above are all official, with the following explanation:

Flats and Apartments—

Records of construction, demolition and conversion of flats and apartment suites are official and complete, except that Tenement House Department's record of conversions to business in certain outlying Boroughs for the year 1910 is not complete. We have, therefore, allowed an additional 100 apartments converted.

1 and 2 Family Houses—

Boroughs of Bronx and Richmond. The foregoing statistics are completely official.

Borough of Manhattan. The figures are official, except that the Borough is unable to state separately the respective numbers of 1 and 2 family houses constructed. We have therefore assumed that these were all 1 family houses. The table is in this respect too conservative.

Borough of Brooklyn. The statistics of 1914-1919 (inclusive) are officially confirmed by the Bureau. The Records of 1910-1913 (inclusive) are taken from the Bureau's records by investigator.

Borough of Queens. Here the figures from 1915 to 1919, inclusive, are based on building plans filed in the Bureau, which were followed by actual construction. From 1910 to 1914, however, the records do not show how many of the buildings for which plans were filed were actually constructed, but on the basis of the experience from 1915 to 1919, was that 80% of the plans were followed by the construction of buildings, the figures as given above, which are conservative, accurately indicate the number of new housing accommodations in the Borough.

(4) Taking the Borough of Manhattan alone, we find the following facts:

Population according to the Census of 1910	2,331,542
Population according to the Census of 1919	2,284,103
Decrease in population since 1910	47,439
Since 1910 there were constructed in the Borough of Manhattan new apartments, flats and tenements	49,235
In the same period there were constructed there one and two-family houses	254
Total number of new housing accommodations	49,489

From these there should be deducted:		
Number of flats and apartments demolished	12,189	
Number of apartments and flats converted to other uses	7,318	
Number of one and two-family houses demolished and converted to other uses	2,754	
Total number of demolitions and conversions		22,261
Net increase of habitations in tenements and one and two-family houses 1910 to 1919, inclusive		27,228
These would accommodate, at the rate of five persons per home		136,140
And on the basis of four persons per home		108,912

The foregoing statistics do not include the number of persons accommodated in the entire City of New York, or in the Borough of Manhattan in new non-housekeeping apartments, hotels, apartment hotels and private houses. The total number is naturally quite substantial.

(5) On page 5 of the report the committee directs attention to the number of summary proceedings instituted in the Municipal Court of the City of New York during 1919 and for the first eight months of 1920 as follows:

	1919 For twelve months	1920 Eight months Jan. 1 to Aug. 31
Manhattan	49,852	37,298
Bronx	17,288	16,469
Brooklyn	25,853	29,621
Queens	3,303	3,699
Richmond	327	355
Total (for the five Boroughs of Greater New York)	96,623	87,442

Since the preparation of the foregoing statistics as to the number of summary proceedings instituted in the Municipal Court of the City of New York, we have secured the figures showing the number of summary proceedings instituted in that court during the months of September, October and November, 1920. They are as follows:

	September	October	November
Manhattan	3,333	3,156	1,503
Bronx	1,864	929	1,351
Brooklyn	2,847	2,405	1,669
Queens	403	347	277
Richmond	52	34	34
Total	8,499	6,871	4,834

An examination of the records of the Municipal Court of the City of New York for the years 1916, 1917 and 1918 shows that in 1916 the total number of summary proceedings in the five boroughs of Greater New York was practically the same as in 1919, and in 1917 and 1918 greatly exceeded those of 1919 and 1920, as shown by the following table:

SUMMARY PROCEEDINGS

RECORD OF THE MUNICIPAL COURTS OF THE CITY OF NEW YORK

	1916	1917	1918	1919
Manhattan	61551	103463	101317	49852
Bronx	9536	13054	13560	17288
Brooklyn	21495	16193	24470	25853
Queens	1888	2688	3799	3303
Richmond	343	408	806	327
Total for the five Boroughs of Greater New York	94813	135806	143952	96623

(6) It is claimed that there is a lack of housing accommodations in the City of New York. Ref-

erence to the advertising columns of the daily press, however, shows that there are a large number of eligible apartments that are unoccupied. To some extent the apparent shortage is due to the fact that various classes of tenants persist in crowding into central locations, and avoid suburban or outlying localities where abundance of accommodations may be found. There are others who believe that their social status is dependent upon their living in fashionable neighborhoods and along or near the principal avenues, and rebel against living in less select regions. They are, however, unwilling to pay for the consequences to which they deliberately contribute and therefore, have asked the Legislature to append an emergency clause to the Constitution which will enable them to live near Fifth Avenue at the expense of the landlord. The respondent here affords an excellent illustration. He is a bachelor, who occupies a sumptuous suite of rooms on West 57th street, but is unwilling to pay for the whistle after he has contracted to do so.

(7) It is also stated on page 5 of the report that over 60,000 tenants were notified to vacate on October 1, 1919, "irrespective of the rental, and the President of the Board of Municipal Court Justices of the City of New York stated September 16, 1920, 'the summary or dispossess proceedings against tenants during the month of October will exceed in number the record for the whole year 1919.'" In the message of Governor Smith the number of notices is stated to be 100,000. No evidence is given in support of these estimates. They are mere conjectures. Notices given to the tenants are not a part of the records of the Municipal Court unless followed by summary proceed-

ings. It is not pretended that summary proceedings were instituted in the cases in which such alleged notices were given.

It is a fact, however, that a considerable number of notices were issued by landlords in order to preserve their legal rights formally, due to the enactment of the March, 1920, legislation, and especially to the amendment of Section 232 of the Real Property Law, which also gave rise to a considerable number of the summary proceedings instituted during the first half of 1920. This fact is made clear by the phrase which we have quoted, that these notices were sent out "irrespective of the rental." But for these notices leases which would have terminated on or before October 1, 1920, would have been extended automatically until October 1, 1921. This the landlords very naturally sought to prevent. Hence these notices, which to a great extent did not eventuate in summary proceedings.

(8) The report further refers to the congested calendars of the Municipal Courts due to the large number of rent cases. As shown by the statistics supplied by the records of those courts, there was nothing abnormal in the number of these cases during 1919 and 1920. The excitement in these courts was largely due to the March laws, pursuant to which the Municipal Court Justices undertook to determine the amount of rent that the several tenants were to pay regardless of the existing contracts between the landlords and the tenants. The word had gone forth that the Municipal Courts would fix the amount of rent to be paid, contracts to the contrary notwithstanding, and it was, therefore, but natural for tenants who desired the advantages of the new order of things,

and to have their obligations readjusted, would proceed pell-mell to the several local cadis invested with these extraordinary powers in order to have their rents reduced and their landlords kept out of their property. Proceeding with the traditional Turkish methods, these local magistrates, without taking testimony, rendered their edicts amid the plaudits of the beneficiaries. The unusual character of the proceedings naturally created a species of hysteria. To a great extent these boisterous demonstrations were likewise due to the action of the Justices with respect to the granting of stays in cases where the landlords were held to be entitled to evictions. In other words, whatever there was of abnormality was the direct consequence of the extraordinary legislation that ignored contracts and the legal remedies to which the landlords were entitled for the enforcement of the obligation of their tenants.

The report of the legislative committee further states that the March rent laws were generally successful in preventing evictions. That being the fact, the fear of disorder or of numberless evictions in October is without foundation, as are the September laws, which, it is asserted, were based on such fear.

We have already shown that a new volume of litigation which threatens to glut the calendars has been called into life by Chapter 944 of the Laws of 1920.

(9) Upon page 20 of the report are contained recommendations of the legislative committee. A comparison between those recommendations and the laws actually passed in September shows that the latter proceeded far beyond these recommendations. Apparently the committee had in

mind merely to enlarge the powers of the court with regard to the granting of stays. The Legislature, however, enacted laws which, if valid, destroyed altogether the right during the period of more than two years to institute dispossess proceedings or actions of ejectment.

(10) On page 20 of the report the committee further asserts that "there have been more accommodations for families built in New York City since the enactment of the (March) laws than for the corresponding period in the preceding year." This statement shows upon its face that it is specious and misleading. It was literally impossible between April 1, 1920, and September 20, 1920, to begin the construction of and complete any buildings save the cheapest and smallest of houses adapted for one family only. Naturally one who had commenced the construction of a building and had practically completed it at the time of the enactment of the March laws, would have finished the construction irrespective of the nature of the legislation. If the report of the committee is intended to convey the idea that the construction of a larger number of buildings adapted for dwelling purposes was commenced between April and September, 1920, than between April and September, 1919, the records of the Building Department show the inaccuracy of such a statement. As a matter of fact few plans for dwelling construction were filed between April and September, 1920, and a number of those that had previously been filed were cancelled after April 1, 1920.

(11) The proponents of this legislation, in order to sustain it, assert that it was intended to increase housing facilities. Necessarily that could

only be accomplished if additional houses were constructed. From the very nature of the legislation, however, it is evident that these laws discourage the building of new houses. If the natural law of supply and demand were to control, then one might have expected an increase in the number of dwelling houses. When, however, the Legislature undertakes to limit the return of one who invests his capital in the construction of houses, then nothing can be more discouraging to him than the knowledge that the return on his investment will be limited.

The fact that Chapter 944 is not made applicable to houses completed or the construction of which is commenced subsequent to the enactment of that statute does not help the situation. If the result of the operation of the statute intended to fix the rentals chargeable for buildings devoted to dwellings, is to reduce the rental values, then one who is confronted with the proposition as to whether or not he will construct a building for that purpose, will naturally consider the competition which he would be obliged to meet from those who are the owners of existing completed apartment houses, and he will at once come to the conclusion that his rentals would be determined by the extent of such competition.

Moreover, it is a matter of common knowledge, as demonstrated by the investigations of the Lockwood Committee, that the reason why there has been so little new construction during the past two years lies in the fact that the prohibitive cost of materials and labor debars a prudent and responsible investor from embarking on a venture the only certainty of which is that the initial cost of his investment would be at least twice as great as

the cost would have been during an average number of years prior to 1920. In fact buildings recently constructed cannot be profitably rented at the rentals now prevailing for similar property.

Added to the element of construction cost, we have the further fact that money borrowed in order to facilitate the construction of buildings, if it can be obtained at all, can only be secured at a high rate of interest. The average lender of money would naturally consider the security of his investment and would recognize the probability that the shrinkage in real estate values resulting from an eventual reduction in building and labor costs would jeopardize his loan secured by mortgage on a building erected during the period of inflation.

These facts show that this legislation, far from meeting the housing problem, tends merely to aggravate existing conditions. This statute, therefore, in its practical operation, amounts to nothing more than a legislative attempt to fix the amount that a landlord shall be permitted to charge his tenant for the use of his property.

IV.

The Opinion rendered by Mr. Justice Laughlin in the N. Y. Appellate Division of the First Department in Edgar A. Levy Leasing Co., Inc., vs. Siegel (now under review in the Court of Appeals).

Without undertaking to deal with the many propositions with which this opinion deals, it is deemed useful to call attention to some of its statements which are regarded as either fallacious

or as having no bearing on the proposition here involved.

(1) In its statement of facts the message of Governor Smith is set forth in its entirety, it being apparently regarded as a justification for the legislation enacted at the extraordinary session of the Legislature.

We have already pointed out the distinctive features of that document. Its gravamen lies in the discussion of the general housing problem that affects not only the City of New York, but the entire country—the same problem that was considered by the Reconstruction Commission appointed by him to make an exhaustive inquiry into the subject. The references made to the matter of rentals consist mainly of generalizations, unaccompanied by the statement of any evidence or reference to any statistics justifying the conclusions intimated. The "selfishness and greed" of some landlords are mentioned, and profiteering is hinted at, but there is a total absence of probative facts that would support the conclusion that profiteering was general or that the rentals asked by the landlords were not justified by market conditions. The fact that there are some landlords who are selfish and greedy is no more justification for this revolutionary legislation than the dishonesty of some merchants or farmers or mechanics would justify legislation destructive of their business.

Adams vs. *Tanner, 244 U. S. 594.*
People ex rel. Tyroler v. *Warden of Prison, 157 N. Y. 116.*

In the latter Chief Judge Parker, referring to the business then under consideration, said:

> "The business can be honestly conducted; it has been so conducted in the past by honest men engaged in it; and the most that is asserted is that there are some men engaged in the business who have imposed on the public. The same assertion can be made with equal truth of every business, trade and profession. Because some coal dealers and vendors in sugar cheat in weight and dealers in paint and oil in measurement and in tobacco in quality, it has not hitherto, we venture to say, been thought the proper remedy to make it a felony for persons hereafter to engage in such business unless they have been duly appointed as agents by the corporations manufacturing or producing the product."

At the risk of repetition, we insist that if it was the purpose of the Legislature to deal effectually with the housing problem by stimulating the building of additional houses, then this measure neutralizes that purpose, because it discourages the ownership of property that is to be devoted to occupation for private residence.

As was said by Mr. Justice Blackmar in *People ex rel. Rayland Realty Company* v. *Fagan* decided by the N. Y. Appellate Division of the Second Department, and which is now awaiting decision by the New York Court of Appeals:

> "But it is not perceived how the operation of Chapter 942 (and we may add *a fortiori* Chapter 944) * * * will add one square foot to the supply of dwelling accommodations or will increase in any respect whatever the demand therefor. If the purpose and object of the Legislature is solely to relieve the housing situation, this act, applying the test quoted from Judge Peckham (referring to *Welch* v. *Swasey, 214 U. S. 105*) has no real substantial relation to this public object. * * * It is not permissible to say

that a landlord will dispossess his holdover tenants for the purpose of holding the property vacant. His purpose is to increase the rent to the incoming tenant. While the price of building material, the cost of labor, the amount of taxes and the expense of maintenance are increasing, the tendency of these laws is to prevent that increase from finding its expression in the increase of the rental value of property. I, therefore, conclude that this law has no reasonable tendency to correct the condition of housing shortage."

(2) Mr. Justice Laughlin erroneously says (*fols. 232-233*) that the validity of that part of Chapter 944 of the Laws of 1920 which creates the presumption that the lease is unjust, unreasonable and oppressive where the rent has been increased over the rent of the year before and of the provision making it the duty of the landlord to file a bill of particulars, is not presented for decision.

We unqualifiedly contend that these are two of the various elements (by no means all) which tend to establish the invalidity of this enactment. The reasons for this contention have already been presented.

(3) At folios 235, 236 the opinion states the question for determination to be whether, until new houses and apartments are built and the so-called "serious shortage of housing accommodations" (which we dispute) would continue, the owners of existing houses, tenements and apartments have a constitutional right to take advantage of their tenants and of others desiring accommodations and exact exorbitant rentals free from the exercise of any legislative regulation or control, or whether it was competent for the Legislature to limit "during the period of the emergency" such owners who saw fit to lease their premises to the recovery of reasonable rentals.

This is clearly a begging of the question. It assumes, without justification and in direct contravention with the statistics, that the landlords have been taking advantage of their tenants or have exacted exorbitant rentals. It assumes that the landlords are invoking the courts for the purpose of obtaining a determination as to what is or is not a reasonable rental. All that they have done has been to exercise what they believed to be their constitutional rights of property—the right to occupy it or dispose of it by sale or lease and to enjoy the rights and attributes of ownership. Like all other owners of property, they are seeking by contract to receive for its ownership or use such consideration as the person seeking to buy or lease the property is prepared to give. It is not a question as to what the vendee or lessee is anxious to give. It is a matter of market value. That value is dependent upon a multitude of elements. The owner of the property is not bound to sell it or to lease it. He may occupy it himself. He may withdraw it from the market altogether. He may turn the key in the door and decline to accept any tenants, especially on terms that might involve him in serious loss.

The housing shortage which is claimed to constitute an emergency is certainly not due to the fault of the owner of property who is willing to rent it on terms which he regards as just and fair, and yet, because he is possessed of such property which another desires to occupy on terms which he has agreed to pay for the right of occupancy, the owner of the property is to be deprived of the benefit of his contract because he is unwilling to let his premises on terms unsatisfactory to himself. The alleged emergency on which this legis-

lation is sought to be predicated is not caused by the owners of property, but, if it exists at all, by conditions for which they have no responsibility and which they cannot control. This statute is made applicable to cases where contracts have been entered into and where the tenant has entered into occupancy and refuses to pay the stipulated price. Only one tenant can occupy the demised premises. There can, therefore, be no question of over-crowding or of the impairment of the public health, safety and order. The Legislature, therefore, instead of dealing with the general housing condition, has merely undertaken to nullify leases entered into by the tenant with the landlord and to compel the latter, in the event that the tenant is unwilling to abide by the terms of his lease in so far as it relates to the subject of rental, to resort to the courts for the enforcement of the contract or to see on a *quantum meruit*.

Whether such legislation constitutes due process of law is the real question, when stripped of all perfervid rhetoric. It is the same question that would arise if the contract were one for the sale of a dwelling house at a stipulated price which the reasonableness of which the vendee subsequently seeks to compel the vendor to submit to the adjudication of the court. It is the same question that would arise if the contract related to personal property of any kind, however necessary it might be; or to personal services, however essential. The same principle would in logic be applicable to the case of a landlord who, at a period of business depression, had leased an apartment for a term of years at a rental which would be insufficient to pay the carrying charges of the property and who, therefore, desires a recon-

struction of his contract by the court. In recent years there have been tens of thousands of instances where landlords could well have invoked such a remedy had the Legislature provided for it and the Constitution permitted it. It is safe to say, however, that such a landlord would have been laughed out of court.

In a word the actual question to be decided is, whether the Legislature can prohibit the owners of private property lease for a private use from letting it except on such terms as shall be approved by a jury in the event that the tenant shall claim that the rental is unjust, unreasonable and oppressive.

(4) The opinion further contends that, under the Constitution, the use of private property and the liberty of contract may be regulated to an extent seriously affecting the use and value of the property and at times destroying it.

The cases cited involved sanitary regulations or property that had been destroyed for the purpose of preventing the spread of conflagration or of a pestilence, which are referred to as emergencies. These authorities have no application. To say that this legislation is a health regulation is so far-fetched as to border on absurdity. It is only necessary to refer to the opinion of Judge Earl in *Matter of Jacobs, 98 N. Y. 98,* for an answer to this contention. The tenement houses and apartment houses now existing in the City of New York have for years been operated in conformity with the sanitary regulations and tenement house laws that have been strictly enforced by the public authorities. The fact, therefore, that an apartment is leased to A instead of to B has no bearing whatsoever on sanitary conditions.

The argument advanced by the Court proves too much. It would not only justify such legislation as the present in cases of a so-called "emergency," but it would be equally applicable if the conditions now existing were to be permanent. It should not be forgotten that the report of the Reconstruction Commission is frankness itself in so far as it gives no promise of a better housing situation for years to come. The mere fact that the present act is to be in force from October, 1920, to November, 1922, would not prevent another Legislature from continuing it in force for two, six, or ten years longer because of the continuance of the "emergency" and its development from an acute to a chronic disease.

What the landlords are interested in knowing is, whether or not the burdens of such a condition, for which they are in no manner responsible, are to be borne by them alone, and whether their bankruptcy and ruin are likely to obviate the causes of the housing conditions to which the Governor and the Joint Committee of the Legislature have called attention.

(5) At *folios 243-244* Mr. Justice Laughlin argues that there may be a monopoly of housing conditions and that the Legislature had before it facts presenting a collective monopoly of housing accommodations from which no relief could be afforded to break the monopoly by new buildings for a considerable period of time, and that the landlords, "although not shown to be acting in concert," were taking advantage of tenants, thereby presenting an intolerable condition if the owners were to be left free to exact exorbitant rentals.

It is difficult to understand what the learned Justice means when he speaks of "a monopoly of housing conditions" or "a monopoly of housing

accommodations". It is conceded that the landlords are not responsible for the housing conditions. High rents would certainly not tend to the abstention by others from the building of dwelling houses. They would rather stimulate it. The housing conditions are, therefore, due to other causes. They can be found in the unfortunate experiences of landlords in the past, when they were obliged to content themselves with insufficient rentals and were compelled to suffer the loss of their properties as a result of the foreclosure of mortgages which they were unable to pay. They are also to be found in high building-costs, which render an investment in dwelling houses economically unprofitable and which would therefore deter the owner of capital from investing in such an enterprise, especially when confronted by such a law as that now under review, which it is frankly said is held *in terrorum* over the landlords.

If there were a monopoly of the landlords within the meaning of the Donnelly Act, there would be an adequate remedy to meet any abuse thereby created. The very fact that it is conceded that there is no such monopoly is a complete answer to the argument. If it is meant that the owners of dwelling-house property, taking them in the aggregate, have a monopoly of that class of property as against those who own no property whatsoever, then the logical conclusion flowing from the statement of Mr. Justice Laughlin would be that the only effective relief is to be found in the socialistic state. There there would then be no private property, no capital, no right of individual enjoyment of the fruits of one's labor, thrift and industry. There would be no contracts, and all

individual effort would go for naught. In fact the individual would be merged in a discordant mass. The Russian Soviets have carried this idea to a conclusion which is even more logical. They determine for every man, except those who are in control of the machinery of what they are pleased to call a government, how much, or rather how little, he shall eat, how he shall be clad or to what extent he shall remain naked, where he shall be housed, what newspapers he shall read, what he shall think, whither he shall go and what he shall do throughout the year.

In referring to this "collective monopoly" the opinion seems to deal exclusively with houses rented by their owners for dwelling purposes. It is interesting to know what is to be done with the dwelling houses that are not rented but which are occupied by the owners, and especially those that are occupied only during a portion of the year. Logically those who introduced a resolution in the Board of Aldermen of the City of New York requiring property that is not occupied by the owners to be let at a reasonable rental to those who might desire to make use of it, came much nearer to the suggestion of a remedy against insufficient housing accommodations than the Legislature did. If the imaginary conditions adverted to in the Governor's message in fact existed, then the desideratum would be to find shelter for those who are destitute of it and not to tell a landlord whom of several applicants he shall permit to occupy his property.

In this connection it is almost amusing to quote from the opinion at *folios 246-247*:

> "This, I think, is a matter of great public concern warranting the intervention of the

> Legislature, which of course cannot compel the owners to open their doors and admit those who are without homes, for that would be a taking of the property; but it may, I think, provide that for the period of the emergency so long as they see fit to lease their property and enjoy the protection of the State, they must deal justly with their tenants."

In other words the Legislature, by limiting the rentals that a small investor receives from apartments which he rents to tenants in a building in which he himself may have his home can restrict him as to the amount of his rent, but a person owning a house in which there may be forty unoccupied rooms and who himself may not have been within its doors for a period of years, is to be protected in the luxury of absentee possession of his castle. In the one case it would be regarded as the exercise of the police owner. In the other it would be a taking of property in violation of the Constitution.

(6) The opinion of Mr. Justice Laughlin repeatedly draws a parallel between this legislation and the usury laws which, it is stated, have existed from time immemorial for the purpose of preventing oppression by money-lenders, who, without regulation by statute, could take advantage of the necessities of those desiring the use of money and exact exorbitant amounts therefor (*fols. 245-246*).

Jeremy Bentham and other distinguished publicists have denied the economic soundness of these laws. We are not, however, concerned in the economic aspect of the subject, but rather in the juridical point of view.

An historical examination of the subject shows that there is no parallel between this statute and the usury laws.

Not only was the taking of interest forbidden by the Mosaic Law, but the law of the "Twelve Tables" and the laws of China and of India likewise forbade it. Domat and Pothier ranked all interest upon money under the name of usury, and condemned it. The Ecclesiastical Law strictly forbade it, and its prohibition was embodied in English legislation.

In *3 Coke's Institute, 150*, Coke referred to it as

> "being forbidden by the law of God, a sinne and detestable."

In *Tyler on Usury, p. 44*, the author shows that during the Middle Ages the people of England, and especially the English Church, entertained the opinion, then current in Europe, that the taking of any interest for the loan of money was a detestable vice, hateful to man and contrary to the laws of God.

See also:

> *Gray* v. *Bennet, 3 Metc. 522.*
> *Dunham* v. *Gould, 16 Johns. 367.*

The early colonial acts on the subject of usury were modeled after *Statute 12 Anne, ch. 16*, and the statute now in force in the several States relating thereto are mere re-enactments or modification of the colonial laws.

(7) At *folios 261-262* the learned Justice says:

> "It is to be borne in mind that there has been no attempt to compel landlords to make leases, and so far as this statute, construed

> not retrospectively, but prospectively, as I am construing it, is concerned, they are at liberty to discontinue using their property for the housing accommodations of others. The Legislature has provided merely that so long as they continue to use their premises during the period of the emergency, they must not take advantage of the homeless and, by leasing to the highest bidder, accommodate non-residents perhaps to the exclusion of citizens of this State and unduly oppress residents of the State." (See also *fol. 246.*)

There is a *non sequitur* between the two parts of this statement. But even if there were not, the first sentence points out one of the infirmities of this legislation. A landlord who is unwilling to lease his premises under the conditions of this legislation may withdraw them from the market and close his house altogether. This is not only not forbidden by the legislation, but as has already been shown, according to the view of the learned Justice, cannot be forbidden. This accentuates our contention that this legislation in no manner deals with the housing problem. It only tends to aggravate it. When the Court therefore, in the second sentence, declares that the Legislature has merely provided for the case of those landlords who continue to rent their premises to the houseless are to be penalized for doing so by bearing not only the sins of those who will not build but also of those who will not throw their premises open for occupancy, the law is at once converted into an absurdity and an arbitrary interference with the ownership of property.

But going further, it is difficult to understand what is meant by the reference in the passage that has been quoted, to the accommodation of non-

residents to the exclusion of citizens of the State. Is it intended to declare that in the letting of property there is to be a differentiation between residents and non-residents of the State? If so, it would be a violation of Article IV, Section 2, of the Constitution of the United tSates, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States," and of Section 1 of the Fourteenth Amendment, which reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." But why this reference to non-residents? The moment they come into this State to live they become residents. And if they take up their residence here it is quite evident that there can be no serious problem of housing accommodations either for residents or non-residents.

(8) It is needless to refer to the various authorities cited in the opinion further than we already have or otherwise than in general terms. They are all cases which either involve matters of health and public safety or deal with corporations that are the creatures of the legislatures, which, in dealing with them, are acting under their reserved rights, or relate to businesses which are of the character known as public utilities or deal with statutes that have the direct sanction of constitutional provisions, as, for example, the New York Workmen's Compensation Laws and the recent legislation of North Dakota authorized by its Constitution and considered in *Green* v. *Frazer, 253 U. S. 235.*

The learned Justice very wisely shrank from giving his approval to the recent decision of the

United States District Court for the District of Indiana in *American Coal and Mining Co.* v. *Special Coal and Food Commission of Indiana*, relied upon by those who are seeking to sustain this legislation, and who, on the other hand, treated contemptuously the carefully considered opinion in *Hirsh* v. *Block, 267 Fed. Rep. 615*, where the Court of Appeals of the District of Columbia declared legislation similar to the present unconstitutional, even though the law was sought to be sustained under the war powers reposed in Congress (*fols. 152, 153*).

V.

While it may be conceded that the Legislature may take away any remedy that it has created, and may modify court procedure, it has no power to take from an owner of property or of a property right all remedies for the enforcement of his legal rights. That in itself constitutes deprivation of property without due process of law and an impairment of the obligation of a contract. Hence Chapter 947 of the New York Laws of 1920 is unconstitutional.

The statute referred to (Appendix II) amends the New York Code of Civil Procedure in relation to actions to recover the possession of real property in certain cities, is violative of the fundamental law. It undertakes to add to Title I of Chapter 14 of the Code of Civil Procedure, which deals with actions relating to real property, a new section known as 1531-a. Reciting the existence of a public emergency, the nature of which

is not defined, it enacts that no action as prescribed in the article referred to shall be maintainable to recover the possession of real property in a city of a population of 1,000,000 or more, or in a city in a county adjoining such city, occupied for dwelling purposes, except an action to recover such possession on the ground that the person is holding over *and* is objectionable, in which case the landlord shall establish to the satisfaction of the Court that the person holding over is objectionable; or an action where the owner of record of the building, being a natural person, seeks in good faith to recover possession of the same or a room or rooms therein for the immediate and personal occupation by himself and his family as a dwelling; or an action to recover premises for the purposes of demolishing the same with the intention of constructing a new building, plans of which new building shall have been duly filed and approved by the proper authority. This section is to be in effect only until November 1, 1922.

In other statutes which went into effect concurrently with the act just described (Chapters 942, 943, 945, 948 and 950 of the New York Laws of 1920) and which are in *pari materia*, with that now under discussion, the right to maintain summary proceedings against tenants holding over when in default of rent has also been taken away.

Consequently the owner of property is at the mercy of his tenant, who cannot be ousted, although in unlawful possession of the property belonging to the landlord. The tenant may, therefore, in defiance of his contract, express or implied, and of the legal rights of the owner of the property which he occupies, continue in posses-

sion of the property to which he has no title of any kind.

The validity of this statute is now under advisement by the New York Court of Appeals in *Guttag* vs. *Shatzkin* and *810 West End Avenue Inc.* vs. *Stern*, which were argued in that Court in January of this year after the Appellate Division of the First Department had declared it to be unconstitutional. The opinions rendered by that Court are so full as to render elaborate argument in support of its conclusion unnecessary.

In fact the opinion of Mr. Justice Laughlin in these cases states our argument in compact form:

> "I regard this statute also as plainly unconstitutional on the ground that it was the final enactment of the Legislature culminating in the removal of every remedy, excepting in the particular instances stated, of an owner for the recovery of the possession of real property occupied by tenants whose terms had expired and who were under contract obligations expressed in the leases or implied by law to vacate the premises and surrender possession thereof to the owner or their landlord. The power of the Legislature to take away one remedy and substitute another is not questioned; but that was not done, and the right to an appropriate remedy by an appeal to the courts for the performance of a contract obligation is a part of every lawful contract and is read into it, and the destruction or substantial destruction by such a suspension of that remedy by a legislative act constitutes the taking of property without due process of law (*Gilman* v. *Tucker*, 128 N. Y. 190; *Fletcher* v. *Peck*, 6 Cranch, 87; *Grantly* v. *Ewing*, 3 How. (U. S.) 707; *Planters' Bank* v. *Sharp*, 6 How. (U. S.) 301; *Seibert* v. *Lewis*, 122 U. S. 284; *McGahey* v. *Virginia*, 135 U. S. 662; *Ex parte Milligan*, 4 Wall. 2; *Kin* v. *Missouri*, 107 U. S. 221; *Green* v. *Biddle*, 8 Wheat.

(U. S.) 1, reargument, p. 75-84; *Bronson* v. *Kinzie*, 42 U. S. 310; *Edward* v. *Kearzey*, 96 U. S. 595; *Effinger* v. *Kennedy*, 115 U. S. 566; *Walker* v. *Whitehead*, 16 Wall. (U. S.) 314; *McCracken* v. *Hayward*, 48 U. S. 607; Cooley on Constitutional Limitations, 411).

In *Gilman* v. *Tucker* (*supra*) the court said:

'The legislature has no power to deny, for any cause, to a party who has been illegally deprived of his property, access to the constitutional courts of the state for relief; the denial of a remedy for the wrong inflicted deprive him of his property as effectually as if it had been taken from him by direct legislative enactment.'

In *Walker* v. *Whitehead* (*supra*) the court said:

'The laws which exist at the time of the making of a contract and where it is to be performed enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement. Nothing is more material to the obligation of a contract than the means of its enforcement. The idea of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment.'

Cooley (*supra*) says:

'Where a statute does not leave a party a substantial remedy according to the course of justice as it existed at the time the contract was made, but shows upon its face an intention to clog, hamper or embarrass the proceeding to enforce the remedy, so as to destroy it entirely, and thus impair the contract so far as it is in the power of the legislature to do it, such statute cannot be regarded as a mere regulation of the remedy, but is void, because a substantial denial of right.'"

This is nothing more or less than the application of the doctrine so elaborately and convincingly laid down in *Green* v. *Biddle*, 8 Wheat. 1, 84, which has long been a leading case.

See also:

Bronson vs. *Kinzie*, 1 How., 310, 315, 317.
Edwards vs. *Kearzey*, 96 U. S. 595, 599.
12 *Corpus Juris*, 1067.
Litchfield vs. *Bond*, 186 N. Y., 80.

The action of ejectment is not a remedy created by statute. Its maintenance has always been regarded as a common law right. It is a possessory action.

Bradt vs. *Church*, 110 N. Y., 542.
Gas Light Co. vs. *Rome, Watertown & Ogdensburg R. R. Co.*, 11 Civ. Pro. Rep., 244.

In *Den* vs. *Morris*, 7 N. J. Law, 6, 9, where the history of this remedy was learnedly discussed, Chief Justice Kirkpatrick said:

> "For though the form of the action may have been changed, yet the great principles of right have not been changed, nor can they be without a total subversion of the whole system of property in land."

Ever since Magna Charta it was one of the elementary rights of the citizen to appeal to the courts for relief against any infraction of his rights: "We will sell to no man, we will not deny to any man either justice or right."

Here the Legislature has by laws passed concurrently with the statute now under discussion taken from the plaintiff the remedy by summary

proceedings. He has, therefore, been deprived of every remedy, not only that created by statute, but also by that existing at common law and no new or equivalent remedy has been given in the place of those taken away.

The Legislature has thus literally taken the plaintiff's property from it, has deprived it of the right of possession existing at law and secured by contract between the parties, and has for all practical purposes given such possession to the tenant, though whatever right to possession he had during the existence of his lease had ended before the landlord's action was brought and at the time when possession was demanded and refused.

The tenant was in the eye of the law a trespasser; and yet the Legislature has attempted to take from the owner of the property the right to seek relief in the courts against such trespasser. The question at once arises whether ours is no longer a government of laws and has become one of men only.

VI.

If the Legislature takes away the existing remedies and substitutes no adequate remedy in their stead, there is not only a denial of justice, but also an infraction of the general jurisdiction in law and equity that is vested in the Supreme Court of the State under the terms of Section 1 of Article VI of the Constitution. There has probably been no more deliberate attempt at paralyzing the functions of our judicial tribunals than by the act now under consideration. Carried to its logical conclusion, it would justify the Legislature in repealing all legal remedies and procedure and in destroying the judicial branch of the Government.

Chapters 942, 943, 945 and 948 of the laws of 1920, purport to relate to summary proceedings. They must, however, be read in conjunction with Chapters 944 and 947 of the Laws of 1920, as to which they are *in pari materia*. They indicate a legislative purpose to deprive the landlord of all legal remedies in the case of a holding over after the expiration of his term by the tenant. Thus read the entire legislative scheme constitutes a violation of the Judiciary Article of the State Constitution.

As bearing on this phase of the subject we call attention to the following decisions: *People ex rel. Mayor* vs. *Nichols*, 79 N. Y. 582; *DeHart* vs. *Hatch*, 3 Hun. 375, 380; *Alexander* vs. *Bennett*, 60 N. Y., 204, 207; *Mussen* vs. *Ausable Granite Works*, 63 Hun, 269.

The opinions of Mr. Justice Laughlin referred to under Point V shows that Chapter 947 was declared violative of Art. VI, Section 1, of the New York Constitution.

VII.

It is respectfully submitted that Chapter 136, 944 and 947 of the New York Laws of 1920 are unconstitutional.

Washington, D. C., March 2, 1921.

LOUIS MARSHALL,
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Appendix.

I.

CHAP. 944 OF THE NEW YORK LAWS OF 1920.

AN ACT to amend chapter one hundred and thirty-six of the laws of nineteen hundred and twenty, entitled, "An act in relation to defenses in actions based upon unjust, unreasonable and oppressive agreements for rent of premises occupied for dwelling purposes in cities of the first class or in cities in a county adjoining a city of the first class," generally.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter one hundred and thirty-six of the laws of nineteen hundred and twenty, entitled "An act in relation to defenses in actions based upon unjust, unreasonable and oppressive agreements for rent of premises occupied for dwelling purposes in cities of the first class or in cities in a county adjoining a city of the first class," is hereby amended to read as follows:

§ 1. Unjust, unreasonable and oppressive agreements for the payment of rent having been and being now exacted by landlords from tenants under stress of prevailing conditions whereby the

freedom of contract has been impaired and congested housing conditions resulting therefrom have seriously affected and endangered the public welfare, health and morals in certain cities of the state, and a public emergency existing in the judgment of the legislature by reason thereof, it shall be a defense to an action for rent accruing under an agreement for premises in a city of the first class or in a city in a county adjoining a city of the first class occupied for dwelling purposes that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive.

§ 2. Where the answer contains the defense mentioned in section one of this act, the plaintiff within five days after the filing of the answer or within such time as the court upon good cause shown may determine, shall file with the clerk of the court a verified bill of particulars, setting forth the gross income derived from the building of which the premises in question are the whole or a part; the number of apartments in the building and the number of rooms in each apartment, and the number of stores in such biulding; the rent received for each such apartment or store for the period of one year last past; the consideration paid by the landlord for the building, if he be the owner thereof, or if he be a lessee the rent agreed to be paid by him; the assessed valuation of the property and the taxes for the current year; the annual interest charge on any incumbrance paid by the landlord; the operating expenses with reasonable detail; and such other facts as the landlord claim affect his net income from such property. Issue shall not be deemed

joined until the filing of such bill of particulars. Upon the plaintiff's failure to file said bill of particulars within the time limited the court upon motion of the defendant shall dismiss the complaint.

§ 3. Where it appears that the rent has been increased over the rent as it existed one year prior to the time of the agreement under which the rent is sought to be recovered, such agreement shall be presumptively unjust, unreasonable and oppressive.

§ 4. Nothing herein contained shall prevent the plaintiff from pleading and proving in such action a fair and reasonable rent for the premises and recovering judgment therefor, or from instituting a separate action for the recovery thereof.

§ 5. If in an action against the occupant of premises for rent and for the rental value of the use or occupation thereof, the plaintiff recovers judgment by default, the judgment shall contain a provision that if the same be not fully satisfied within five days after entry and service upon the defendant of a copy thereof, the plaintiff shall be entitled to the premises mentioned in the complaint and to the direction that a warrant shall issue commanding the sheriff, marshal or other officers charged by law with the duty of executing judgments to remove all persons therefrom.

§ 6. If in any action for rent or rental value, the issue of fairness and reasonableness of the amount demanded in the complaint be raised by the defendant, he must at the time of answering

deposit with the clerk such sum as equals the amount paid as rent during the preceding month or such as is reserved as the monthly rent in the agreement under which he obtained possession of the premises. If the defendant fail to make such deposit, the court shall strike out the denial or defense raising such issue. Such deposit shall be applied to the satisfaction of the judgment rendered or otherwise disposed of as justice requires. Where a judgment is rendered for the plaintiff it shall contain a provision that if the same be not fully satisfied from the deposit or otherwise within five days after the entry, and service on the defendant of a copy thereof, the plaintiff shall be entitled to the premises described in the complaint and a direction that a warrant shall issue commanding the sheriff, marshal or other officer charged by law with the duty of executing judgments to remove all persons therefrom.

§ 7. Whenever the court in which the action is brought has jurisdiction to vacate a judgment rendered upon default, it shall have power to open a default in an action mentioned in section five of this act to vacate, amend, correct or modify any process, judgment or warrant in furtherance of justice for any error in form or substance, and to grant a new trial upon any of the grounds for which a new trial may be granted by the Supreme Court in an action pending therein.

§ 8. In case of an appeal by the defendant, the execution of the judgment and warrant shall not be stayed, unless the defendant shall deposit with the clerk of the court the amount of the judgment and thereafter monthly until the final determina-

tion of the appeal an amount equal to one month's rental computed on the basis of the judgment. The clerk shall forthwith pay to the plaintiff the amount or amounts so deposited.

§ 9. This act shall not apply to a room or rooms in a hotel containing one hundred and twenty-five rooms or more, or to a lodging house or rooming house occupied under a hiring of a week or less.

§ 10. This act as hereby amended shall not apply to a new building in the course of construction at the time this amendment takes effect or commenced thereafter and shall be in force until November first, nineteen hundred and twenty-one.

§ 2. This act shall take effect immediately.

II.

Chap. 947 of the New York Laws of 1920.

An act to amend the code of civil procedure, in relation to actions to recover the possession of real property in certain cities and to repeal section fifteen hundred and thirty-one-a thereof.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article one of title one of chapter fourteen of the code of civil procedure is hereby amended by adding at the end a new section, to be section fifteen hundred and thirty-one-a, to read as follows:

Sec. 1531-a. A public emergency existing, no action as prescribed in this article shall be maintainable to recover the possession of real property in a city of a population of one million or more or in a city in a county adjoining such city, occupied for dwelling purposes, except an action to recover such possession upon the ground that the person is holding over and is objectionable, in which case the landlord shall establish to the satisfaction of the court that the person holding over is objectionable; or an action where the owner of record of the building, being a natural person,

seeks in good faith to recover possession of the same or a room or rooms therein for the immediate and personal occupancy by himself and his family as a dwelling; or an action to recover premises for the purpose of demolishing the same with the intention of constructing a new building, plans of which new building shall have been duly filed and approved by the proper authority.

This section shall be in effect only until the first day of November, nineteen hundred and twenty-two.

SEC. 2. Section fifteen hundred and thirty-one-a of such code, as added by chapter one hundred and thirty-five of the laws of nineteen hundred and twenty, is hereby repealed.

SEC. 3. This act shall take effect immediately.

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Supreme Court of the United States

October Term, 1920, No. 731.

MARCUS BROWN HOLDING COMPANY

Complainant-Appellant,

vs.

MARCUS FELDMAN and BENJAMIN SCHWARTZ, FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,

Defendants-Appellees.

Appeal from United States District Court for the Southern District of New York.

BRIEF FOR TENANTS-APPELLEES.

SAMUEL R. GERSTEIN,
Attorney for Tenants-Appellees.

DAVID L. PODELL,
MARTIN C. ANSORGE,
BENJAMIN S. KIRSH,
J. J. PODELL,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

MARCUS BROWN HOLDING COMPANY,
Complainant,

against

MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,
Defendants.

TENANTS—APPELLEES' BRIEF.

Statement of the Case.

This is an appeal from an order dismissing the bill of complaint herein (fols. 22, 23 and 24).

The order dismissing the bill of complaint was decided at a term of the United States District Court, Southern District of New York, composed of three judges, in accordance with section 266, Judicial Code, as amended (Section 1243 of the United States, Compiled Statutes 1918) (fol. 26).

The bill of complaint alleges that the Marcus Brown Holding Company, the complainant, is a New Jersey Corporation (fol. 69). That on the 30th day of September, 1920, it became the owner in fee of premises 215 West 91st Street, Borough

of Manhattan, City of New York, by deed of conveyance executed by the Marcus Brown Construction Company, Inc. (fol. 70). That by virtue of said assignment, the said Marcus Brown Construction Company, Inc., assigned to this complainant all its right and interest to leases entered into between the Marcus Brown Construction Company, Inc., and the persons occupying the said premises on the date of the conveyance (fol. 72).

The bill of complaint alleges that on or about the 27th day of June, 1917, the plaintiff's predecessor in title and the defendants Marcus Feldman, Benjamin Schwartz, and Frank Schwartz entered into a lease in writing wherein plaintiff's predecessor let and said defendants hired for a term of three years commencing October 1st, 1917, and ending on September 30, 1920, the seven room apartment No. 92 on the ninth floor of the said premises (fols. 73 and 74).

The bill of complaint then alleges that on the 1st day of October, 1920, and thereafter the complainant demanded that the defendants vacate said premises, which said defendants refused to do (fol. 76).

The complaint likewise alleges that notice in writing was served upon the said defendants thirty days prior to the expiration of the term of said case (fol. 86), and further stated that the said defendants, by the exercise of ordinary diligence, could have obtained an apartment in the City of New York, after the said 1st day of October, 1920 (fol. 87).

The complainant's prayer for relief among other things is that the said defendants be enjoined from entering upon or continuing to occupy the said apartment and that chapters 942, 943, 944, 945, 946, 947, 948, 949, 950, 951 and 952 and Chapters 131, 132, 135, 136, 137 and 138 of the laws of 1920 of the State of New York be adjudged null and void and in controvention of the provisions of the Constitution of the United States of America (fols. 127 and 128).

The defendants Marcus Feldman Benjamin Schwartz and Frank Schwartz, in their answer admit, the execution of the lease stating that these defendants agreed to pay the annual rental of the sum of $2100, and admit remaining in possession after October 1st, 1920 (fol. 214).

The defendants as and by way of a first, separate and affirmative defense, set up chapter 942 of the laws of 1920 and Chapter 947 of the laws of 1920, whereby the Legislature of the State of New York, by enactment provided certain statutory defenses, more fully hereinafter set forth (fols. 220 to 231).

As and by way of a second separaate defense, the defendants deny the allegations in the bill of complaint that between the time that the said notice was given on the 30th day of September, 1920, the said defendants by the exercise of ordinary diligence could have obtained an apartment in the City of New York to be used and occupied by them on and after the said 1st day of October, 1920 (fol. 231).

The defendants state that in or about the month

of March, 1920, these defendants requested from the Marcus Brown Construction Company a renewal of the lease for the apartment occupied by them (fol. 232). That prior to the first day of October, 1920, the Marcus Brown Construction Company demanded of these defendants posession of the apartments and that as to the defendants Benjamin Schwartz the said company notified him that the premises had been leased to other parties from the 1st day of October, 1920 (fol. 233).

That the defendants immediately after that notice began to make effort to secure an apartment at all suitable for their requirements, and both the defendants and other members of defendants' households sought about in repeated efforts from day to day, in and about the city to locate an apartment for even more than a reasonable rental, and more than the prevailing rental (fol. 234). That the defendants and those of their families who sought about in such effort were unable to locate apartments, wherein they could be assured that they could have possession of the premises by the 1st day of October, 1920. That while there were certain apartments for which leases could be signed, the rentals attempted to be exacted, were exorbitant, unjust and oppressive, and in each such instance the owner stated that he would not guarantee possession by the 1st day of October as the premises were then occupied by tenants who were uncertain as to whether they would be able to secure other quarters, and that the landlords were uncertain as to whether said tenants would vacate by the 1st day of October (fol. 235).

That the defendants were and continued at all times, ready, able and willing to pay an increased rental for the purpose of retaining the said premises. That the defendants were not accorded an opportunity by the landlord to discuss the matter of rental (fol. 236).

That the defendants then informed the landlord that they were ready to pay a reasonable increase in the rental of said premises, if allowed to continue in possession, which said offer was refused.

The Housing Laws of September, 1920.

The first of these amendments is known as Chapter 942. Prior to the enactment of this amendment, summary proceedings to dispossess were permitted where a tenant's term had expired, and he was holding over beyond the expiration of that term, without the consent of the landlord (Section 2231, Sub. 1, N. Y. Code Civil Procedure). Under the April, 1920, amendments, Chapter 137, L. 1920, the Court, upon the entry of a final order in favor of a landlord in a holdover proceeding, had the power to grant a stay of the warrant not exceeding one year.

Chapter 942 of 1920 (Sept. amdnt.), provides in substance, that by reason of the existing emergency, no summary proceeding to recover possession of a dwelling apartment, against a holdover after the term had expired will be permitted in cities of a population of one million or more, or in adjoining cities, except in the following four instances:

(a) Where the tenant is objectionable;

(b) Where the owner desires the premises for his own use;

(c) Where the owner in good faith intends to demolish the property and erect a new building;

(d) Where the petitioner is a member of a cooperative association or corporation, which intends to occupy the premises for its own exclusive and permanent use.

Chapter 943, in substance, amends the previous law by permitting a stay on appeal from a final order in holdover proceedings upon the proper security being furnished.

Chapter 944 permits the interposition as a defense to an action for rent, that such rent is unjust, unreasonable and oppressive. Pending the determination, the tenant must deposit the monthly rent previously paid by him. A judgment rendered for the landlord in such a case must contain a provision that all rent due must be paid within five days after the entry of the judgment or the premises surrendered.

Chapter 945 provides, in substance, that a summary dispossess proceeding will lie for non-payment of rent where the petitioner alleges that the rent is no greater than the amount for which the tenant was liable for the month preceding the default. It further provides that in such a proceeding the tenant may interpose a defense that the rent is unjust, unreasonable, and oppressive.

Chapter 946 amends the banking law, so as to permit investments of sinking and trust funds of the State of New York, or of any municipal corporation in the bonds of the land bank of the State of New York.

Chapter 947 relates to the remedy of ejectment, and limits that remedy against tenants holding over after their terms to the four instances above enumerated, to wit, personal occupation by the landlord; demolition of premises for reconstruction; objectionable tenancy, and occupation by a cooperative ownership association

Chapter 948 exempts hotels from the operation of these statutes, and provides that these amendments shall not apply to new buildings in the course of construction, at the time the amendment takes effect, or commenced thereafter.

Chapter 949 provides for relief from taxation of any new construction in the discretion of a Local Government Board for a period of ten years.

Chapter 950 permits the opening of a default in summary proceedings.

Chapter 951 provides that where a lease requires the furnishing of hot or cold water, light, etc., and the landlord or his representative deliberately refuses to furnish that service, or where the landlord deliberately interferes with the quiet enjoyment of the leased premises by an occupant, he or they are guilty of a misdemeanor.

Chapter 952 regulates the time for pleadings in summary proceedings and extends the same.

Chapter 953 abolishes the jurisdiction of the Justices of the Peace in smaller towns, in civil

actions for the recovery of rent or in summary proceedings.

The Prior Laws and the Legal Effect of the Amendments.

Prior to April 1st, 1920, summary proceedings to dispossess were permitted against tenants (a) holding over beyond the expiration of their term without the permission of the landlord, (b) defaulting in the payment of rent under the agreement by which the demised premises were held, (c) defaulting in the payment, for sixty days after the same were payable, of taxes or assessments levied on the demised premises, which the tenant had agreed to pay, (d) being in possession under a lease for three years or less, and who had during the term become a bankrupt or insolvent, (e) engaging in illegal business; and against the following classes of persons holding over after notice to quit had been given, (f) where property had been sold by virtue of an execution against the possessor and the title under the sale had been perfected, (g) where property had been sold under foreclosure by sale, (h) where an agreement with owner to occupy the land and cultivate it by shares had expired and (i) squatters, intruders, and licensees whose license had been revoked.

In addition to these summary remedies, the landlord had the remedy of ejectment known technically as "An action to recover real property." By the amendments of April 1st, 1920,

(Sec. 2231, Subd. 2a, et seq., Code of Civil Procedure) a defense was allowed to a proceeding to dispossess for non-payment, that the rent claimed was unjust, unreasonable and oppressive. Such a rental was deemed presumptively unjust and oppressive, if it increased the previous year's rental in excess of 25 per cent. In holdover proceedings, the amendments of April 1st, 1920, permitted the Justice trying the case, after the entry of a final order in favor of the landlord to stay the issuance and execution of the warrant to dispossess, for a period not exceeding one year, upon proof that the tenant had made effort to secure an apartment at a reasonable rental and was unable to do so. The amendments of April 1st, 1920, likewise permitted the interposition of all defenses in ejectment, which were available in summary proceedings. In short, that meant if the ejectment suit were based upon a default for non-payment of rent, the tenant could defend on the ground that the rent was unjust, unreasonable and oppressive.

The legislation of April 1st, 1920, made no provision whatsoever for a stay of the execution of the judgment in ejectment, in the event that the tenant could not secure a similar apartment or similar premises at a reasonable rental elsewhere. In short, to circumvent the salutary provisions, permitting the granting of a stay in a summary proceeding, for holdover, in a proper case, the landlord could resort to ejectment, charge the tenant with holding over beyond the expiration of his term, and unless the tenant filed a perjurious

answer to delay the proceedings, he would be ousted at the expiration of twenty days' time, without any power to stay the judgment in ejectment or the execution thereof.

The effect of existing laws with all amendments to date, can be summarized as follows:

Where a landlord of a dwelling apartment holds his property for rental purposes—for purposes of barter and trade—and where any of the apartments are occupied by unobjectionable tenants holding over after their terms have expired, he must accept a reasonable rental for his property, and permit the tenant to remain in occupancy. In such a case, he can neither invoke the summary remedy of dispossess, nor can he invoke ejectment. This restriction is to apply for a period of two years.

It must be remembered that the landlord still has a wide choice with respect to the use of his property. He can not, under these amendments, be deprived of the personal use of his property, if he desires the same for his own occupancy. He can not, under these laws be compelled to harbor an objectionable tenant. The word "objectionable" has not been limited, restricted or qualified by any statutory definition. His property can not be used for the conduct of any illegal business, trade or occupation, nor can it be occupied for any illegal purpose. He can not be compelled to harbor a disseisor or a trespasser. Even as against holdovers after the term, he is not even prevented from demolishing the entire building, if he in good faith, intends

to erect another structure in its place nor is he limited in the time, character or quality of structure to be erected thereon. The tenant whom he is compelled to retain acquired possession originally with the full knowledge, consent, and approval of the landlord. The owner's title in fee remains unaffected. There is no encroachment upon his premises.

Possessory remedies of ejectment and summary proceedings are still preserved against tenants who hold over after a default in the payment of rent. Since Section 942 amends Section 2231, Subdivision 1, the statutory possessory remedy of summary proceedings is still preserved against any tenant, lessee at will or at sufferance, and his assigns, under-tenants or legal representatives who holds over or continues in possession of the demised premises after a default in the payment for sixty days after the same shall be payable of any taxes or assessments which he has agreed in writing to pay pursuant to the agreement under which the demised premises are held. (Subd. 3 of Section 2231.) Summary proceedings may still be maintained (under Subd. 4 of Section 2231) where the tenant, being in possession under lease for a term of three years or less, has during the term taken benefit of insolvent or bankruptcy laws. The possessory remedy of statutory summary proceedings may be maintained against any person who holds over and continues in possession of real property after notice to quit has been given (under Subd. 1 of Section 2231)

where the property has been sold by virtue of an execution against him and title under the sale has been perfected.

(Under Subd. 3 of Code Section 2232) Summary proceedings can still be maintained against a tenant who holds over and continues in possession of real property under an agreement with the owner to occupy and cultivate upon shares after his occupancy has expired. (Under Subd. 4 of Code Section 2232) Summary proceedings may be maintained where the tenant or any person to whom he has succeeded has intruded into or squatted upon any real property without the permission of the person entitled to the possession thereof, and the occupancy thus commenced has continued without permission from the latter, or after a permission given by him has been revoked and notice of the revocation given to the person or persons to be removed.

It is most important to bear in mind that the law declares to the owner of a dwelling apartment as follows:

(1) "So long as you are holding your apartment for the purposes of barter and trade, all you can exact is a reasonable rental.

(2) If you have an unobjectionable tenant, whose lease has expired, occupying the apartment, you must permit him to remain, and he in turn must pay you this reasonable rental or vacate."

It would have been idle ceremony for the Legislature to have amended the summary proceeding

in this particular, without likewise amending the remedy of the ejectment.

We respectfully contend, in favor of the tenant, that this regulation of private ownership is a just and reasonable exercise of the police power of the State. This is essentially emergency legislation, superinduced by shortage of housing facilities, which has become so acute as to constitute a menace to the public health and general welfare of the community at large.

We propose, in so far as the limits of this brief permit, to analyze the facts and figures, as far as the same are available from authoritative sources, which show the real existence of this emergency, and prove the necessity for this legislation, and the invocation of the police power of this State to regulate conditions.

Nature and Extent of the Emergency.

The world-wide conditions of the dearth of dwelling advantages have been ably described in an article entitled "Rent Regulation and the Housing Problem" written by Walter F. Dowd and Carl H. Zeiss, in the Journal issued by the American Bar Association of January, 1921. We shall restrict our summary to the representative facts of our great metropolitan city.

That there is at the present time a serious shortage of housing accommodations is judicially recognized in every opinion concerning the emergency housing laws. We make reference to the actualities only to portray the gravity of the tenant's plight.

The primal cause for present housing conditions is, of course, to be traced to the world war. Its immediate effect was, during its pendency and for a time thereafter, to divert men, money and materials from the constructive works of peace to the general destructive efforts of the war. The diversion of the men was the direct cause of the shortage of labor for house building, and the consequent rise of labor costs. A similar increase of cost followed the shortage of materials, and the same was true of capital.

These three primal and basic commodities brought constructive home building to a practical standstill during the period of the war. Building homes or dwelling apartments were classed as a non-essential.

On the other hand, large cities became centres of tremendous war activity. The extension of the war business caused demolition of apartment buildings, and the construction in their places of business buildings. In addition, large cities attracted large numbers of war laborers, who were serving in both skilled and unskilled capacities in the conduct of the war. Millions of men from every section of the country were transported through the large cities and especially so, in the case of Greater New York, to and from ports abroad. The war unquestionably created a great tendency on the part of the rural population, to gravitate towards the large cities.

Of all of these facts, the Court may well take judicial notice.

During the period of the war, the more serious task of combating the common enemy, absorbed the attention of the public, to the exclusion of the serious local problems, particularly the problem of proper and adequate housing. In the period of reconstruction, following the armistice, this problem loomed large in every city of the land. That the emergency is real and vitally affects the very foundation of our social system—the home—is apparent from the following facts and figures, more particularly as applied to the City of Greater New York.

In 1910, the population of Greater New York was 4,794,935. In 1915, it was 5,468,190; by July 1st, 1919, it was 6,006,794. In 1910, in Manhattan Borough 208 tenements (apartments of 3 or more families) were erected. The following table shows that in each of the years since 1910, there has

been a decrease in the number of tenements until the low mark was reached in 1918, when only nine tenements were erected in the Borough of Manhattan, during the entire year:

(Report of Superintendent of Buildings.)

Estimated Population July 1st each year.		Manhattan	Bronx	Bklyn
4,794,935	1910	208 tenements	971	563
4,929,586	1911	194 "	372	549
5,064,237	1912	182 "	607	763
5,198,888	1913	158 "	330	533
5,333,539	1914	133 "	269	715
5,468,190	1915	193 "	489	920
5,602,841	1916	163 "	224	605
5,737,492	1917	23 "	59	201
5,872,143	1918	9 "	22	22
6,006,794	1919	44 "	95	295
1st six months	1920	15 "	16	26

In the year of 1910, the 208 tenements were planned at a total cost of $16,925,00; in the year 1919 the 44 tenements cost $13,575,000, and the 15 tenements for the first six months of 1920 cost $7,925,999. In the year 1910, in the Borough of Bronx, 971 tenements were erected at a total cost of $334,941,000. In 1919, 95 tenements cost $9,654,000.

In the Borough of Brooklyn, in the year 1910, they actually erected 563 tenements at a total cost of $7,523,000. In the first six months of 1920, the 26 tenements erected cost $2,291,000. *The aver-*

age cost of tenement house in the last ten years was about $165,000. *The average cost for the first six months for* 1920 *was about* $528,000.

For every building to be erected, the records show that 1 6/10 buildings are demolished. Only 3½% of all the proposed new buildings are tenements or apartment houses. 60% of the buildings demolished since 1916 are residence buildings of all classes.

The report of the Joint Legislative Committee on Housing, transmitted September 20, 1920, declares:

> "The most flagrant and the most acute form of extortion and one which is almost inescapable is rent profiteering. And as for eviction, never in the history of the City of New York have there been so many evictions."
>
> "Attention is directed to the summary proceedings record of the Municipal Court of the City of New York.

	1919. Full twelve months	1920. Eight months Jan. 1 to Aug. 31.
Manhattan	49,852	37,298
Bronx	17,288	16,469
Brooklyn	28,853	29,621
Queens	3,303	3,699
Richmond	327	355
Total (for the five boroughs of Greater New York	96,632	87,442

Over 60,000 tenants have been notified to vacate on October 1, 1920, irrespective of the rental, and the President of the Board of Municipal Court Justices of the City of New York, stated September 16, 1920, the summary or dispossess proceedings against tenants during the month of October will exceed in number the record for the whole year 1919. If the hard-hit public is to be relieved, action must be taken within a period of ten days after the Legislature convenes, otherwise our new May day, October first, will find us in a terrible condition. Our courts will be packed with frantic men and women. You will have to act quickly.

During the past year the calendars of the Municipal Courts of New York City have been so congested with rent cases that other business has been deferred. A Court calendar of 300 or 400 cases a day is not unusual. Men, women and children wait for hours, frequently until late in the evening, for their cases to be called."

And again:

> "The attempts of some landlords to obtain more rent by taking tenants to court month after month and the granting of short stays from time to time subject families to great anxiety. They know not when they may have to move, have no place to go, lose respect for the laws and the courts, who to them seem unable to protect their rights. They readily fall victims to the agitator."

It likewise quotes Stewart Browne, president of the United Real Estate Owners' Association,

with a membership of over 12,000 actual owners and investors in real estate, as having said, August 4, 1920:

> "As a whole the rent laws were necessary and are working fairly well. Does any sane person think that the Legislature will modify the rent laws to enable landlords to evict tenants?"

And further declares that:

> "Maine, Wisconsin, New Jersey and New York have adopted laws seeking to restrain profiteering in rents. Similar measures are under consideration in other states.
>
> Every state in the union having populous communities is seeking a remedy, and all of them are promoting 'Own-Your-Own-Home' movements."

The preliminary report of the Legislative Committee appointed to investigate Housing and Ice Conditions of the State, submitted January 7th, 1920, declares:

> "We are confronted by a condition so acute and indicative of such peril to the public welfare, that no mere theory, no matter how sound in normal times, must be permitted, even temporarily, to withstand the peril of necessity."

The report of the Mayor's Housing Conference Committee, submitted June 21, 1920, declares (this

committee numbered among its members some of the largest realty owners and builders in the Greater City):

"The deliberations of the various committees have established beyond the possibility of a doubt the factors preventing the erection of houses at the present time. These factors are three in number, as follows:

First, shortage of labor;
Second, shortage of capital;
Third, shortage of building material.

Any one of these factors would be sufficient to cripple seriously the building of houses, **but when all three are combined, the situation** is indeed serious and must be met by drastic and unusual methods. It must be added also that the situation is made more acute by the erection of several large business buildings which are under way, and which greatly shorten the supply of labor and materials so badly needed for the erection of houses. In fact, the only construction on a large scale in the Greater City is the building of office buildings, lofts, factories, garages, theatres, etc."

* * * * * *

"A survey of the conditions is such that in the judgment of the Committee, it is justified in the belief that the present famine of housing space will be manifestly more acute by October 1st, that at present appears, when thousands of families will be returning to

the City from quarters now temporarily occupied by them in the country at the seashore resorts."

* * * * * *

"Your Committee finds that the construction of homes is fully four years behind. Prior to 1914, approximately 28,000 homes were provided annually by the erection of new tenement houses alone. The tenement houses in course of construction at the present time will provide only 3,863 apartments. The one and two-family houses being erected will provide 8,405 more and 394 apartments are being constructed in apartment hotels. A total of 12,662 homes are therefore in the course of construction. Only 1,624 were provided by the tenement houses built last year, however; only 2,706 in 1918; and only 14,241 in 1917. To meet the normal demand a sufficient number of tenement houses must be erected each year to provide at least 20,000 apartments. It is safe to say, therefore, that at least 100,000 apartments are now urgently needed, which number will apparently be increased in 1921 to at least 115,000."

"Your Committee reiterates that quick action is necessary and therefore recommends that the Governor be petitioned to call an extra session of the Legislature with as little delay as possible, for the purpose of enacting legislation that will relieve the condition."

POINT ONE.

In view of the extraordinary emergency in the shortage of housing in the larger cities, the September enactments constitute a proper exercise of the police power of the State. The due process clause, the obligation of contract clause, and the equal protection clause are not violated.

Presumption of Constitutionality.

A sound construction of the federal constitution must allow to the state legislature a similar discretion which, since the holding in McCullough v. The State of Maryland, 4 Wheaton, 316, at 421, has been allowed to the national congress. In construing the elastic clause of the federal constitution, Chief Justice Marshall there declared:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

That the guiding principle here enunciated has been accepted in probing into the state's power to enact legislation has been often repeated by judicial declaration by the courts in the various American jurisdictions. The legislature's avowed

purpose of resisting the disintegration of hundreds of thousands of homes in our crowded city, satisfies every element of the great Chief Justice's canon.

In considering legislation, the courts will not declare a statute unconstitutional unless it is clearly, palpably, and plainly so. Any doubt should be resolved in favor of the power of the expressed will of the Legislature.

In Sweet v. Rechel, 159 U. S., 380 at page 392, Harlan, J. says:

> "But in determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such an enactment. It must be regarded as valid unless it can be clearly shown to be in conflict with the Constitution. It is a well settled rule of constitutional exposition that if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed. Talbot v. Hudson, 16 Gray, 417, 422; Fletcher v. Peck, 6 Cranch, 87, 128; Sinking Fund cases, 99 U. S., 700, 718."

In Sharpless v. Mayor of Philadelphia, 21 Penn. 147 at page 164, Black, C. J. says:

> "There is another rule which must govern cases like this; namely, that we can declare an Act of Assembly void, only when it vio-

lates the constitution *clearly, palpably, plainly;* and in such manner as to leave no doubt or hesitation on our minds. This principle is asserted by judges of every grade, both in the federal and in the state courts; and by some of them it is expressed with much solemnity of language (citing authorities.) A citation of all the authorities which establish it would include nearly every case in which a question of constitutional law has arisen. I believe it has the singular advantage of not being opposed even by a dictum."

Reluctance of Judiciary to Question Legislative Policy.

In our constitutional system the judicial tribunals are not super-legislatures which review the economic, social and political policy of the representative law-making bodies. The courts do not sit as boards of revisers to perfect the details of measures passed by the popular assemblies. The expediency of legislative enactments, the policy of statutory codes, are beyond the scope of judicial review. Difference of opinion is not a ground for reversal by the judiciary. Nor is the fact that the method invoked seems not to be the best a basis for constitutional determinations. The courts are confined to a determination of the legal power of the legislature, and the advisability of legislative interference is not subject to the review of the judiciary. The reason for this is cogent. Unlike the legislature, the courts have no expert ma-

chinery to collect the facts. They must adjudge without the aid of deliberation of legislative reference bureaus, hearings before committees, and the testimony of specialists who have conducted detailed investigations.

The inquiry of the Courts as to the constitutionality is therefore restricted to a determination of whether there is a reasonable relation to the purpose competent for the legislature to effect, and whether it is in any view adapted to the end intended.

Holmes, J., upholding the prohibition of dealings in margins in stock exchange, in Otis & Gassman v. Parker, 187 U. S., 606, says:

> "While courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality, with which they do not agree. CONSIDERABLE LATITUDE MUST BE ALLOWED FOR DIFFERENCES OF VIEW, AS WELL AS FOR PECULIAR CONDITIONS WHICH THIS COURT CAN KNOW IMPERFECTLY, IF AT ALL. Otherwise a constitution instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held semper ubique et ab omnibus. EVEN IF THE PROVISION BEFORE US

SHOULD SEEM NOT TO HAVE BEEN JUSTIFIED BY THE CIRCUMSTANCES LOCALLY EXISTING IN CALIFORNIA AT THE TIME WHEN IT WAS PASSED, IT IS SHOWN BY ITS ADOPTION TO HAVE EXPRESSED A DEEP SEATED CONVICTION ON THE PART OF THE PEOPLE CONCERNED AS TO WHAT THAT POLICY REQUIRED. SUCH A DEEP SEATED CONVICTION IS ENTITLED TO GREAT RESPECT."

Hughes, J., discussing the statute depriving the defendant company of the defense that plaintiff had accepted the benefits under a contract of membership in its relief department, in Chicago, B. & Q. R. Co. v. McGuire, 219 U. S., 549, 569, says:

"The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on

sound economic theory, whether it is the best means to achieve the desired result, whether in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

In People v. Griswold, 213 N. Y., 92 (prescribing the preliminary and professional education as a condition of the privilege of practicing dentistry), at page 96, Miller, J., says:

"In determining whether statutory requirements are arbitrary, unreasonable or discriminatory, it must be borne in mind that the choice of measures is for the legislature, who are presumed to have investigated the subject, and to have acted with reason, not from caprice. Legislation passed in the exercise of the police power must be reasonable in the sense that it must be based upon reason as distinct from being wholly arbitrary or capricious, *but when the legislature has power to legislate on a subject, the courts may only look into its enactment far enough to see whether it is in any wise adapted to the end intended.* If it is, the court must give it effect, however unwise they may regard it, or however much they might, if given the choice, prefer some other measure as more fit and appropriate."

See also:

State Bank v. Haskell, 219 U. S., 104;
Atlantic Coast Line v. Georgia, 234 U. S., 280, 288.

THE LIBERTY OF CONTRACT IS NOT A UNIVERSAL RIGHT AND MAY BE ABRIDGED WHEN REQUIRED, FOR THE PUBLIC GOOD.

MacLean v. Arkansas, 211 U. S., 539, at page 545, Day, J., says:

> "But in many cases in this court, the right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with the laws declaring the public policy of the state, enacted for the protection of the public health, safety or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract."

In Chicago, Burlington & Quincy R .R. v. McGuire, 219 U. S., 549, page 567, Hughes, J., says:

> "It was recognized in the cases cited as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guarantee of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or

deny to Government the power to provide restrictive safeguards."

In the Legal Tender cases, 12 Wallace 457, at page 551, Strong, J., says:

> "As in a state of civil society property of a citizen or subject is ownership subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority."

This principle that all contracts contain the implied condition that the rightful governmental authority may prohibit the performance of the obligations arising under this private agreement when the public welfare demands a prohibition of its terms, has been approved and followed in Louisville & Nashville v. Mottley, 219 U. S., 467, where Harlan, J., said (page 303):

> "These principles control the decision of the present question. The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable, or to impair its value. That the exercise of such power may be hampered or restricted

to any extent by contracts previously made between individuals or corporations is inconceivable. The framers of the Constitution never intended any such state of things to exist."

See also:

Goodyear Machinery Co. v. Boston Terminal, 176 Mass., 115, 117.

Scope and Extent of the Police Power.

General delineations of the sources and bounds of the governmental authority to promote the social well being of its citizenry are valuable rather as a refutation of mistaken notions than as an unerring guide to a conclusive determination upon the issue of constitutionality in any one given situation. "Police Power" has long since been adjudicated by this court to include more than the justification of legislative acts in the interest of protecting the health, safety and morals of the community. That exact term itself was first employed in the early nineteenth century, in American Constitutional Law, and Chief Justice Marshall's use of it in Brown v. Maryland seems to mark its initial appearance in our constitutional law.

12 Wheaton, 419, at page 443.

The difficulty of its ideal analysis and of its limitless area has been eloquently recognized by Chief Justice Shaw, in Commonwealth v. Alger,

7 Cush., 53, and by this court in District of Columbia v. Brock, 214 U. S., 138, at page 149, where McKenna, J., says:

> "It is the most essential of powers, at times the most instant and always one of the least limitable of the powers of government."

In Eubank v. Richmond, 226 U. S., 137, at page 142, McKenna, J., says:

> "A clash (of the police power with constitutional restraints) will not, however, be lightly inferred. Governmental power must be flexible and adaptive."

Its definition, however, has never been more comprehensively moulded than by Chief Justice Taney, in the License Cases.

5 How. 504, 583.

> "But what are the police of a state? They are nothing more or less than the powers of government inherent in every sovereignty of the extent of its dominions."
> * * * * * * *
> "that is to say the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates."

It has been held to justify state intervention to safeguard the public, Camfield v. U. S., 167 U. S.,

518, 524, and the public convenience and general prosperity of the community.

Harlan, J., emphatically corrects an erroneous view of the police power, in the case of Chicago, B. & Q. R. Co. v. Illinois ex rel. Grimwood, 200 U. S., p. 563. At page 592, the learned justice states:

> "The learned counsel for the railway company seem to think that the adjudications relating to the police power of the state to protect the public health, the public morals, and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals, or the public safety. Hence, he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the drainage district, but only avers that the system of drainage adopted by the commissioners will reclaim the lands of the district, and make them tillable or fit for cultivation. We cannot assent to the view expressed by counsel. We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."

See:

Bacon v. Walker, 204 U. S., 311, 317;
Lake Shore v. Lawrence, 173 U. S. 285.

In Chicago & A. R. Co. v. Trambarger, 238 U. S., 67, page 77, Pitney, J., re-affirms the doctrine of the Lake Shore case, supra.

> "And it is also settled that police power embraces regulations designed to promote the public convenience or general welfare and prosperity as well as those in the interest of the public health, morals or safety. (Citing cases.)"

In Sligh v. Kirkwood, 237 U. S., 52, at page 59, Day, J., says:

> "It embraces regulations designed to promote public convenience or the general prosperity or welfare as well as those specifically intended to promote the public safety of the public health."

In Noble State Bank v. Haskell, 219 U. S., 104, at page 131, Holmes, J., says:

> "Police power may be put forth in aid of what is sanctioned by usage or held by prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

The process of judicial "exclusion and inclusion" has been invoked as well in the case of the validity of exercise of the police power, as in the violation of the due process clause.

> Hudson Water Co. v. MacCarter, 209 U. S., 349, at page 355.

Legislation in Aid of Oppressed Group of Community.

Legislation which seeks to relieve a large part of the community, which stands on an unequal bargaining footing with a small and powerful economic group, has been increasing. An academic assertion of equality in the face of practical conditions of inequality is a fallacious theory. Supposed volition cloaks actual duress. Compulsion is present as a fact where there appears none in legal principle. An overpowered will is merely yielding to a fictitious assent.

In Holden v. Hardy, 169 U. S., 366, at page 395, Brown, J., says:

> "The legislature has also recognized the fact, which the experience of legislators in many states has corroporated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe

guide, and the legislature may promptly interpose its authority."

On the same grounds, a statutory requirement prescribing payment in money instead of store-checks, was upheld (Knoxville v. Harbison, 183 U. S., 13, at page 19) where Shiras, J., said:

> "The scope and purpose of the act are thus indicated. The legislature evidently deemed the laborer at some disadvantage under existing laws and customs, and by this act undertook to ameliorate his condition in some measure by enabling him or his bona fide transferee, at his election and at proper time, to demand and receive his unpaid wages in money rather than in something less valuable. Its tendency, though slight it may be, is to place the employer and employee upon an equal ground in the matter of wages, and, so far as calculated to accomplish that end, it deserves commendation."

Usury laws came within the same principle (Griffith v. Conn., 218 U. S., 563) as did also the requirement of payment of employees at stated intervals (Erie Railroad v. Williams, 233 U. S., 685) the provision for a fair basis in measuring wages (MacLean v. Arkansas, 211 U. S., 539); the prohibition of the assignment of unearned wages (Mutual Loan Co. v. Martell, 222 U. S., 225) and the setting of a minimum wage in certain instances (Settler v. O'Hara, 69 Ore., 519, aff'd 243 U. S. 629), and the protection of sailors (Paterson v. The Endora, 190 U. S., 169).

Regulation of Property "Affected with a Public Interest."

The familiar cases in which private property has been adjudged by the courts to be affected with a public interest and in which the state control over the owner's rights of property has been deemed warranted, have been collected and authoritatively discussed by Mr. Justice Hough, of the Circuit Court of Appeals, in the case of Marcus Brown Holding Company v. Feldman, et al. in the court below. The unanimous court here traced with scholarly detail the extension of the ratio decidendi of the Munn case. We cannot add to the comprehensive succinctness of that learned body's opinion.

> "We may inquire, therefore, whether the subject matter of these statutes is historically appropriate for legislative regulation. While rarely, if ever, exercised in America, there can be no doubt that one of the oldest exercises of sovereignty has been to fix the price and use of some of the necessities of life, especially bread. Shelter is as much a necessary as bread, and that likewise has in times of stress been the subject of regulation, and indeed of apportionment (Freund on Police Power, sec. 308).
>
> There has been, however, since the dawn of our legal history, some occupations closely allied with the necessities of life, which have always been governmentally regulated, both

as to prices chargeable and persons to be served. The usual examples are innkeepers, carriers, millers, ferrymen and wharfingers. At common law the property of these men was held to be devoted to a public use, and their occupations were public businesses (State v. Edwards, 86 Me. 102).

From this ancient doctrine grew the famous series of 'elevator cases' (Munn v. Illinois, 104 U. S. 113; Budd v. New York, 143 U. S. 517; Brass v. North Dakota, 153 U. S. 391). In and by these decisions the doctrine of property devoted to a public use became the doctrine of property affected with a public use, even when (as in the North Dakota case) the elevator owner really wished to and actually did confine his storage facilities to grain he had himself bought and desired himself to sell again (Confer dissenting opinion of Brewer, J.).

The step from property affected with a public use to a 'business affected by a public interest' (i. e., fire insurance) was taken in German Alliance, &c., Co. v. Kansas (233 U. S. 389), and it must be now accepted on that authority as an 'underlying principle that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulations.'

Since this pronouncement, and its legitimate and logical sequel, the 'trading-stamp' case (Rast v. Van Deman, 240 U. S. 342) it may

be and has been asserted that any business is affected with a public interest as soon as the electorate become sufficiently interested in it to pass a regulatory statute. It is not necessary to go so far, but we must and do hold that the business of renting out living space is quite as suitable for statutory regulation, and as much affected with a public interest, as fire insurance and trading stamps.

It is easy to multiply quotations as to the inviolability of private business. It is singular how uniformly they come from decisions holding some business open to intimate regulation while saying that if such business were only private it could not be regulated; but never is 'private business' defined; it is another of those phrases which is left to a process of 'inclusion and exclusion' which really means a finding of facts. Thus when Budd v. New York passed through the Court of Appeals in this state (117 N. Y. 1) Judge Andrews declared 'that no general power resides in the Legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services or interfere with freedom of contract, we cannot doubt.' Similarly and very lately it was said in Producers, &c. Co. v. Railroad Commission (251 U. S. 228): 'It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its own to public

use, that is, to carrying for the public, the state could not by mere legislative fiat * * * convert it into a public utility and make its owner a common carrier.' That applicant had done just what the present plaintiff wants to do—selected its own customers, but it was regulated into taking customers it did not want, and so was Mr. Budd's elevator.

If, therefore, the allotment of necessaries in times of stress is a governmental function known to historic law, and the business now affected is (in such circumstances) one capable of being affected with a public interest, nothing remains of plaintiff's contention except the complaint of inequality in legal protection, i. e., of classification.

This is the nub of the matter, for it is plain that a reason must be clear which justifies on fundamental, i. e. constitutional, principles the selection of one class of landlords for regulation and one class of tenants for favor and protection.

The reason is clear; in property other than dwellings there was not, or there was not shown to be, such scarcity as existed in respect of livable rooms and apartments; the consequences of a scramble for stores or offices are not of the same deteriorating social character as is one for homes; men and women who want a place to sleep are peculiarly at the mercy of landlords, and that inequality in bargaining recognized in Holden v. Hardy (169 U. S. 366) as a proper reason for regulation

was present, and new buildings would certainly cost very much more than had the old ones; wherefore if price regulation or limitation as to them was attempted in advance of completion at unknown cost, it would probably prevent exactly what was necessary to relieve the shortage that occasioned the evil to be combated."

There is nothing inherent in the nature of real property by which its owner can claim immunity from state control in times of pressing necessity. There is nothing in the definition of property affected with a public interest that excludes by its very definition realty as contrasted with personalty, and which prevents an enlargement of its scope to meet the new developments of progress. The home is the seat of the family and with the destruction of such a vital unit of our social structure, our national welfare is threatened.

The advance of civilization brings better living quarters, saner social conditions, and higher standards of human habitation. This legislation is designed to preserve household unity and continue the home as the center of family activity.

Legislative Limits on the Private Use of Real Property.

Legislative limitation on the use of real property in accordance with the owner's volition has been recognized as constitutional in increasingly numerous instances. The absolute definition of a property right, which in its logical extension might appear to give the owner of property an uncontrolled will with respect to its acquisition, use, and disposition, must yield to the power of the state to restrict that enjoyment where the application of the owner's supposed rights would have a detrimental effect upon the public welfare. Just as the freedom of contract is subject to the implied but frequently asserted power of the Government to curb the individual will where an agreement is injurious to the rights of the collective people, the rights of the owners of private property can never contravene the principle of *sic utere*.

In Lincoln Trust Co. v. Williams Bldg. Co., 229 N. Y. 313, a resolution regulating and limiting the height and bulk of buildings thereafter erected, and regulating and determining the area of yards, courts, and other open spaces, and regulating and restricting the location and trades and industries, and the location of buildings designed for specific uses and establishing the boundaries of districts for said purposes was held to be a proper exercise of the police power.

McLaughlin, J., says (p. 317):

"In a great metropolis like New York, in which the public health, welfare, convenience and common good are to be considered, I am of the opinion that the resolution was not an incumbrance, since it was a proper exercise of the police power. The exercise of such power, within constitutional limitations, depends largely upon the discretion and good judgment of the municipal authorities, with which courts are reluctant to interfere. The conduct of an individual and the use of his property may be regulated. (Village of Carthage v. Frederick, 122 N. Y. 268; People v. Gilson, 109 N. Y. 389; Matter of Jacobs, 98 N. Y. 98). In the exercise of the police power the uses in a municipality to which property may be put have been limited, and also prohibited. Thus, the manufacture of bricks (Hadacheck v. City of Los Angeles, 239 U. S. 394). The maintenance of a livery stable (Reinmann v. City of Little Rock, 237 U. S. 171; U. S. v. St. Louis, 194 U. S. 361; a public laundry (Soon Hing v. Crawley, 113 U. S. 703); regulating billboards (Cusack Co v. City of Chicago, 242 U. S. 526); a garage (Matter of McIntish v. Johnson, 211 U. S. 265); the installation of sinks and water closets in tenement houses (Tenement House Dept. of N. Y. City v. Moeschein, 179 U. S. 325, aff'd 203 U. S. 583); the exclusion of certain business (Spumbach v. Lelande, 154 Cal. 679); a hay barn, wood yard or laundry (ex parte Quong Wo, 161 Cal. 220); a stone crusher, machine

shop or carpet beating establishment (Matter of Montgomery, 163 Cal. 457); the slaughter of animals (Croin v. People, 82 N. Y. 318); the disposition of garbage (City of Rochester v. Gutherlett, 211 N. Y. 3093; * * * prohibiting the erection of a billboard exceeding a certain height (City of Rochester v. West, 164 N. Y. 510; Cusack Co. v. City of Chicago, 242 U. S. 526); regulating the height of buildings (Welch v. Swasey, 214 U. S. 91 * * * and generally, any business, may be regulated by a municipality under power conferred upon it by the Legislature (Hauser v. No. British & M. Ins. Co., 206 N. Y. 455)".

In the case of Ex parte Quong Wo, 161 Cal. 220, a zoning law restricting the maintenance of laundries in certain areas of the city was upheld. The court said (page 228):

"It must be admitted, of course, that the business of conducting a public laundry is a lawful and necessary occupation, and that such a laundry is not necessarily a nuisance per se. But this fact alone does not prevent the enactment of such regulations regarding it as may be reasonably be found necessary for the safety, health and comfort of society at large. There are many lawful and necessary occupations not constituting nuisances per se, as to which such regulations by a city have been found necessary * * * ."

(Page 229):

> "Cases in which municipal regulations as to the carrying on the laundry business have been upheld as constituting a reasonable exercising of the police power are numerous. While the cases usually involved simply regulations as to the manner of carrying on the business without prohibiting it in any particular locality *it has been held in this state that an ordinance prohibiting the carrying on of the business within a prescribed portion of a town is a lawful exercise of the police power.* (See in re Hong Fie, 69 Cal. 149; 10 Pac. 327.)"

(Page 230):

> "There can be no question that the power to regulate the carrying on of certain lawful occupations in a city includes the power to confine the carrying on of the same to certain limits, whenever such restrictions may reasonably be found necessary to subserve the ends for which the police power exists, viz: to protect the public health, morals, safety and comfort."

In St. Louis Gunning Advertisement Co. v. The City of St. Louis, 235 Mo. 99, an ordinance of St. Louis limiting the height of billboards to fourteen feet, and its area to 500 square feet, was held by the court to be a valid limitation upon the use of the owner's property. The court said (page 164):

"They are fairly adopted to the end of protecting the community against the evils which confessedly result from the present mode of construction, and to abate the intolerable nuisances which their maintenance naturally and reasonably invites and produces and which are detrimental to the safety, morals and health of the city.

It is upon this same principle that the city licenses, taxes, regulates and controls saloons, slaughter houses, markets, soap factories, etc., and by which the city is authorized to inspect buildings and prescribe rules and regulations for the control of fires, water, gas, electric wires and water closets installed therein."

This case was affirmed by the Supreme Court of the United States in 249 U. S. 269. See also Cusack v. City of Chicago, 242 U. S. 526.

Again in the case of Welch v. Swasey (214 U. S. 91) a restriction upon the height of buildings was upheld. The court said (page 106):

"In this case the supreme judicial court of the state holds the legislation valid, and that there is a fair reason for the discrimination between the height of buildings in the residential as compared with the commercial district. The court has also held that regulations in regard to the height of buildings, and in regard to their mode of construction in cities, made by legislative enactments for the safety, comfort, or convenience of the people,

and for the benefit of property owners generally, are valid."

In re Wilshire, 103 Fed. 620, a Los Angeles ordinance making it unlawful to construct a fence greater than six feet in height for the purpose of placing advertisements thereon, was held to be a valid exercise of the police power. The court said (page 622):

> ***"But it may here be observed that every citizen holds his property subject to the proper exercise of this power, either by the state legislature directly or by public or municipal corporations to which the legislature may delegate it.*** Laws and ordinances relating to the comfort, health, convenience, good order and general welfare of the inhabitants are comprehensively styled 'police laws of regulations.' ***It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional though no provision is made for compensation for such disturbances.*** They do not appropriate private property for public use, ***but simply regulate its use and enjoyment by the owner.*** If he suffers injury, it is either damnum absque injuria, or in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." • • •

In the case of the City of Rochester v. West, 164 N. Y. 510, another ordinance regulating the construction of billboards, the court said at page 514:

> "*When a statute is obviously intended to provide for the safety of a community and an ordinance under it is reasonable and in compliance with its purpose, both the statute and the ordinance are lawful, and must be sustained.* (Citing cases.)"

In Green v. Mayor and Aldermen of Savannah, 6 Ga. 1, an ordinance prohibiting the cultivation of rice within the corporate limits and providing for the removal and destruction of the growing crop of rice within the corporate limits, was sustained. The court said (page 11):

> "The proposition that the citizen is entitled to the full, absolute and uninterrupted enjoyment of his rights of property, under all circumstances, cannot for a moment be admitted. This vested right to his property is not, under all circumstances, absolute and illimitable, so as to authorize him to use it in any manner, when and where he pleases regardless of the rights of others."

In Tenement House Department v. Moeschen, 179 N. Y. 325, the tenement house law enforcing the installation of certain plumbing appliances, was upheld. The court said (page 336):

"Instances are numerous of the passage of laws which entail expense on the part of those who must comply with them and where such expense must be borne by them without any hearing or compensation because of the provisions of the law. (Thorpe v. R. & B. R. Co., 27 Vt. 140, 152.) One of the late instances of this kind of legislation is to be found in the law regulating manufacturing establishments. (Laws of 1887, Chap. 462.) The provisions of that act could not be carried out without the expenditure of a considerable sum by the owners of a then existing factory. Hand rails to stairs, hoisting shafts to be enclosed, automatic doors to elevators, automatic shifters for throwing off belts or pulleys, and fire escapes on the outside of certain factories, all these were required by the legislature from such owner and without any direct compensation to him for such expenditure.

* * * * * *

"'Any one in a crowded city who desires to erect a building is subject at every turn almost to the exactions of the law in regard to provisions for health, for safety from fire and for other purposes.'"

State Restrictions on Land Owners' Control and Possession.

The natural desire of an owner of real property to retain over his property a control of the longest possible duration has, since the early days of the common law, been adjudicated to contravene the public policy of the State.

As an instance of the right of ownership, it is clear that the fullest recognition of the claims of the owner would enable him to bind the property in the hands of others.

The common law rule of perpetuities, however, and the New York State Statute of perpetuities, have restrained the power of the individual to direct the course of the title and possession of property, which he owns in fee, beyond the stated period.

Even the right to make a will of real property was unknown to the common law before the enactment of the Statute of Wills in the reign of Henry VIII, in 1540. Restrictions on the powers to devise and the rules of intestate succession limit the volition of the owner to pass the possession and title to objects of his choice. For example, under Section 18 of the "Decedent Estate Law," no person leaving a wife or child or parent shall devise or bequeath to any social institution more than one-fourth of his or her estate, and no such devise or bequest shall be valid in any will, which shall not have been made and executed at least two months before the death of the testator, and by Section 19 a similar restriction is made

as to certain benevolent, charitable and scientific corporations and, by Section 20, devises or bequests to certain bar associations, veterinary associations and fire insurance corporations are subject to like restrictions.

Indeed, the right of the State of repeal in toto the laws of testamentary disposition has been expressed by the Court of Appeals.

In the Matter of Delano, 176 N. Y. 486, at page 491, the court uses the following language:

> "The privilege of making a will is not a natural or inherent right, but one which the State can grant or withhold in its discretion. If granted, it may be upon such conditions and with such limitations as the legislature sees fit to create."

The abolition of estates tail by laws of 1786, Chap. 12, is further illustrative of the policy of the State to circumscribe the rights of the land owner to designate which person shall possess his property. Where, by the common law, a conveyance to the heirs male of an individual would pass title and possession in that line, the effect of the New York statute has been to curtail the grantor's choice to the selection of the first heir.

Limitation of Landlords' Contractual Powers.

This is not the first emergency in which it has been found necessary to exercise the legislative power of the State in favor of the tenants as a class. In the decade from 1840 to 1850, agrarian conflicts were a potent factor in the legislative and constitutional history of New York State. The legislature at first, and the people by a new Constitution in 1846 later, enacted far-reaching restrictions on the landlord's contractual rights. Thus by a law of 1846, reinforced by organic changes in the State's Constitution (Article 1, Section 13, Const. 1846; Article 1, Sec. 14, Const. of 1894), it was expressly enacted that no grant or lease of agricultural land for a longer period than twelve years thereafter made, in which any rent or services would be reserved, should be valid, and again in Article I, Sec. 12 of the Constitution of 1846, which was enacted in Article 1, Sec. 11 of the present Constitution of 1894, all feudal tenures were declared to be abolished, and by Article 1, Sec. 15 of the Constitution of 1846 (Article 1, Sec. 14 Const. of 1894) all fines, quarter sales or other like restraints upon alienation reserved in any grant of land thereafter made, were declared to be void.

Statutory Action to Prevent the Inception of Disorder in the Community.

The governmental power is invoked with more advantage to forestall the approach of social disturbance than to alleviate the consequences of a short-sighted legislative policy. Adequate precautionary measures are a preventive of ominous public ills. An immediate restraint can preserve the vital functioning of the body politic.

We cannot strip the legislators of their powers of foresight and perspicacity.

> Chinese Exclusion Cases, 130 U. S. 581, 605.

On this principle, coercive measures may be passed to curb imminent or possible disorders. It is in the interest of the public order, and to stave off threatened conflict and clashes that legislation separating races is justified.

> Harris v. Louisville, 165 Ky., 567;
> Hopkins v. Richmond, 117 Va., 723;
> Berea College v. Kentucky, 211 U. S. 45;
> Plessy v. Ferguson, 163 U. S., 537.

And to maintain amicable relations and domestic peace, laws promotive of order and good will among the inhabitants have been upheld as a proper sphere of legislative activity.

> Lore v. Judge, Recorder's Court, 128 Mich., 545;

See also

Dabb v. State, 39 Ark. 353;
Thorp v. Rutland & Burlington R. Co., 27 Vt., 140, 149.

POINT TWO.

Article 6, Section 1, of the State Constitution continuing the general jurisdiction in law and equity of the Supreme Court is not violated by Chapter 947 of the Housing Laws.

There are numerous decisions in the Supreme Court of the United States that neither the contract clause nor the due process clause of the Federal Constitution is superior to the exercise of the police power of the State.

In Atlantic Co. v. Goldsboro, 232 U. S., 548, at page 558, Pitney, J., says:

> "For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety good or general welfare of the community."

See, also,

Chicago & Alton R. R. v. Franbarger, 238 U. S., 67, 77,

and that a legislature may make police regula-

tions although they interfere with the full enjoyment of private property and no compensation be given. (Chicago, etc. Co. v. Drainage Com., 200 U. S., 561.)

And since the inherent sovereignty of the state, as expressed in the police power, to preserve itself and its citizenry raises paramount to the contract clause and the due process clause of the federal constitution, assuredly a provision in the state constitution cannot forbid the exercise of that police power. That would be merely to deny a power without which the state could not maintain its existence, nor protect itself from destruction.

The general jurisdiction in law and equity of the Supreme Court is not violated by Chapter 947 of the housing legislation. A THOROUGH EXAMINATION OF ALL THE CASES CITED IN THE OPINION OF MR. JUSTICE LAUGHLIN OR THE APPELLATE DIVISION, IN GUTTAG V. SHATZKIN, INDICATING THE TRANSGRESSION OF THIS ARTICLE OF THE STATE CONSTITUTION, WILL REVEAL THAT IN NONE OF THE STATUTES IN QUESTION IN THOSE CASES, WAS THE POWER OF THE STATE TO ACT IN AN EMERGENCY EVEN CONSIDERED.

We respectfully contend that if there were no emergency making an invocation of the police power a necessity, a statute depriving the land owner of his right to possession at the termination of his lease, might be deemed an unconstitutional violation of this article and section of the State constitution. Granting that the right to re-

cover possession of real property from holdovers can be traced to the early law of this state, there is ample authority in support of the contention that where the necessity is sufficient in its magnitude, the health and safety of the citizenry and the preservation and order of the social community can be protected by constitutional authority. NOT ONLY CAN THE EMERGENCY SUSPEND TEMPORARILY ONE REMEDY, BUT IT CAN JUSTIFY THE SUSPENSION OF THE ENTIRE CIVIL JURISDICTION OF THE SUPREME COURT. Acts done by military courts disregarding what in ordinary times we have come to denote the fundamental precepts of our constitutional law and our established precedents have been recognized as valid by many weighty opinions of the Supreme Court of the United States.

That the sovereign power of the state may rightfully suspend the civil remedies in times of military or civil disorder, is discussed with authority in Chapter XVI of a Treatise on military law of the United States by Major General George B. Davis. The learned author there says:

> "Martial law or, to speak more correctly, martial rule, or government by military occupation, is a term applied to the temporary government by military authority, of a place or district in which, by reason of the existence of civil disorder, or a state of war and the pendency of military operations, the civil government, is for the time being, unable to exercise its functions."

In Ex Parte Milligan, 4 Wallace 2, at page 127, Mr. Justice Davis says:

> "It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied, if in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown to preserve the safety of the army and society, and as no power is left but the military, it is allowed to govern by martial rule until the laws have their free course."

And that a military tribunal has jurisdiction under our constitution to try offenders according to its own rules of procedure (at a great variance from the practice followed in ordinary times), is ably declared by Mr. Justice Story in Martin v. Mott, 12 Wheaton 10. At page 18, Story, J., says:

> "Another objection to the proceedings of the court martial is, that they took place, and he sentence was given, three years and more after the war was concluded, and in a time of profound peace. But the opinion of this court is, that a court martial, regularly called under the act of 1795, does not expire with the end of a war then existing, nor is its jurisdiction to try these offenses in any shape de-

> pendent upon the fact of war or peace. The act of 1795 is not confined in its operation to cases of a refusal to obey in times of public war. On the contrary, that act authorizes the President to call forth the militia to suppress insurrections, and to enforce the laws of the United States in times of peace. And court-martials are, under the 5th Section of the act, entitled to take cognizance of and punish delinquencies in such cases, as well as in cases where the object is to repel invasion in time of war."

The extent to which the will of the military commander supersedes the established order of legal principles is further illustrated by the emphathic words of Chief Justice Waite in U. S. v. Diekelman, 92 U. S., 520. At page 526, the Chief Justice says:

> "Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity, it is arbitrary, but it must be obeyed. New Orleans was at this time the theatre of the most active and important military operations. The civil authority was overthrown. General Butler, in command was the military power. His will was law, and necessarily so."

And Chief Justice Taney in Luther v. Borden, 7 How. at page 45 says:

"It (Military rule) was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the state authorities. And, unquestionably a state may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the states of this union, as to any other government. The state itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the state as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself, to overcome the unlawful opposition. And in that state of things, the officers engaged in its military service might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched when there were reasonable grounds for supposing he might be there concealed. WITHOUT THE POWER TO DO THIS, MAR-

TIAL LAW AND THE MILITARY ARRAY OF THE GOVERNMENT WOULD BE MERE PARADE AND RATHER ENCOURAGE ATTACK THAN REPEL IT."

It is clearly perceived, therefore, that we must not construe the words of the State Constitution with dry abstractness. As a guide in our constitutional construction we must become imbued with the true spirit of our constitutional system. The preamble of the Constitution of the United States of America, declares that "in order to establish justice", "insure domestic tranquility," "promote the general welfare", the Constitution is ordained and established. The citation of adjudged cases in which the rulings upon a provision of the State Constitution were made in ordinary times, and without stress of impending social crises, challenges even the very words which introduce our American Charter of Liberty. The maxim: "The safety of the people is the supreme law" finds application in the legislative enactment, designed to protect the public welfare and safety. The necessity may be more apparent when the actual disturbance between the homeless and their oppressors is present in a more pressing and obvious degree, or where the destruction of one hundred thousand homes is a commonplace spectacle. The legislature has recorded that the potential gravity of the housing facilities is serious to the point of justifying legislative intervention.

We can not strip the legislators of their powers

of foresight and perspicacity (The Chinese exclusion cases, 130 U. S. 581, 606). On this principal coercive measures may be passed to curb imminent disorders. This restraint reaches even the anticipation of wrong. (Freund Police Powers Sections 8 and 10). Mr. Justice Laughlin in the Appellate Division opinion of Guttag v. Shatzkin, admits that processes may be stayed whether circumstances require that to be done, and that one of the grounds in which jurisdiction is exercised, is that an oppressive use of the writ is threatened or being made. Indeed the learned justice does not question the power of the Legislature on this subject, as by forbidding the eviction of a person who is ill or who is suffering from a contagious disease by which the public health may be in danger. It is admitted in that opinion that the courts can not well question that an emergency existed authorizing the exercise of the police power by the legislature. We have seen, supra, that the perception by the court of detailed error in the legislature's enactment is not a ground for judicial reversal of that action. A certain extent of protection to the tenants is not void, because a more business-like adjustment of the relations between the landlord and tenant could have been effected by allowing the tenant to remain in possession only after he could prove that no other premises were available.

Otis & Gassman v. Parker, 187 U. S. 606;

State Bank v. Haskell, 219 U. S. 104;
Chicago B. & Q. R. Co. v. McGuire, 219 U. S. 549, 569;
People v. Griswold, 213 N. Y., 92, 96.

While the right to possession might ordinarily be said to be an essential right of real property, a boast of that right, casting into insignificance the established governmental authority to interfere with this private right, overlooks the extent to which the police power has already penetrated. The legislature, in the exercise of its police power, will first attempt to remedy by regulation. If it can not remedy by regulation, it will control. If it can not remedy by control, it will appropriate. If it can not remedy by appropriation, it will confiscate. If it can not remedy by confiscation, it will destroy. The public welfare is supreme.

Instances of Regulation and Control.

Grain Elevator Cases,
Munn v. Illinois, 94 U. S. 113;
Budd v. N. Y., 143 U. S. 517.

Zoning Laws,
Ex Parte Quong Wo, 161 Cal. 220.

Segregation Laws,
L'Hote v. New Orleans, 177 U. S. 587.

Tenement House Laws,
Tenement House Dept. v. Moeschen, 179 N. Y. 325.

Sale of Intoxicating Beverages,
Mugler v. Kansas, 123 U. S. 623.

Numerous License Cases where licenses were granted,
Burke v. Memphis, 94 Tenn. 692.

INSTANCES OF APPROPRIATION.
Mt. Vernon v. Alhambra Power Co., 240 U. S. 30.

INSTANCES OF CONFISCATION AND DESTRUCTION.

Limiting Heights of Buildings,
Welsh v. Swasey, 214 U. S. 91.

Destroying Livery Stables,
Reiman v. Little Rock, 237 U. S. 171.

Destroying Brick Making Business,
Hadacheck v. Los Angeles, 239 U. S. 394.

Destroying School Sinks in Tenement Houses,
Tenement House v. Moeschen, 179 N. Y. 325.

Destroying Rice Fields,
Green v. The Mayor of Savannah, 6 Ga. 1.

Destroying Laundry Business,
Ex Parte Quong Wo, 161 Cal. 220.

This far-reaching power of the State was recognized by Mr. Presiding Justice Jenks, in People ex rel. Rayland v. Fagan, Law Journal, December 9, 1920, in which the Appellate Division, Sec-

ond Department, held Chapter 942 constitutional. Jenks, P. J., says:

> "If, however, contrary to the fact, by exercise of the police power all existing remedies were stayed by the Legislature by several statutes for a definite period determined by the legislature, or if in the exercise of the police power all remedies were thus stayed in one statute for a definite period determined by the legislature, even then the legislation would not necessarily transcend this sovereign power. The validity of the statute would depend upon its justification by emergency and the reasonableness of the circumstance."

Mr. Justice Laughlin in the Appellate Division opinion of Guttag distinguishes the precedents for the suspension of stays for a limited specified time during a financial depression or during wars, from the case at bar, in that such laws as have been adjudged constitutional are general laws and do not fit individual cases or particular localities. A classification of protected persons, however, does not violate the fourteenth amendment, where there is equal protection and security to all under like circumstances, to the end that no greater burdens shall be laid upon one than are laid upon the others in the same calling and condition.

Barbier v. Connelly, 113 U. S. 27.

The Supreme Court of the United States has held that no class of persons shall be denied the

same protection enjoyed by "other classes in the same place and in like circumstances."

Connelly v. Union & Co., 184 U. S. at 558.

As Hough, C.J., points out in the Court below, a "rule of reason" is applied in each new case to define the expression "in like circumstances." Tenants in dwelling houses are not arbitrarily chosen under present housing conditions.

In Levy Leasing Co. v. Siegel, reported in the New York Law Journal of Dec. 30, 1920, the Appellate Division, First Department, holds constitutional Section 944 which restricts the exaction of an exorbitant and extortionate rent on the part of a landlord, on the grounds that the Legislature had found that an emergency existed and that the freedom of contract was therefore impaired. If the police power can be invoked to render null and void the enforced collection of excessive rentals, it is difficult to perceive that the emergency should not be considered by the courts to be of such sufficient seriousness as to guarantee the continued habitation of the tenants after their leases had expired. The purpose of the emergency legislation was as important in allowing the tenants to have a home during the cold weather and during times of impending evictions as in preventing the gouging by unconscionable property-owners. If the state has sufficient power to protect the tenant's purse, it has sufficient strength to protect his entire person. The bare assertion that the State can protect the economic well being of its citizenry but

must neglect their physical welfare is a thesis that will not bear painstaking reflection. The finding by the legislature that the integrity of the home and the family must be safeguarded by allowing shelter to thousands in the community foreclosed further scrutiny as to the detailed application and the specific methods pursued by the Legislature in seeking to attain that end. Since the end to be attained is within the legislative authority, reasonableness and not ideal accuracy is the criterion for the court's determination of legislative acts.

It is error to assert baldly that since ejectment was a common law right, that that remedy must be as comprehensive in its scope as it was when the common law of England was transplanted to our sovereign state. An examination of the codification of common law ejectment in New York State reveals that the common law action of ejectment was limited by the codification of the revised statutes of 1830 in the case of mortgagees. At common law, a mortgagee could maintain an action of ejectment but this was abolished by R. S., Part 3, Chap. 5, Title 57, and the present Code of Civil Procedure, Section 1498, has likewise denied the right of a mortgagee to bring an action in ejectment. The cases both under the revised statutes and the Code of Civil Procedure are numerous and clearly hold that the present action to recover real property is not as broad and inclusive in this particular as was the original common law action of ejectment.

In Stewart v. Hutchins, 13 Wend. 486, affirmed

6 Hill 143, the Court says that revised statutes abolishing the right to the mortgagee to bring ejectment "embraces in terms every description of mortgage which could previously have been made the foundation of an action in ejectment." That no right in ejectment now exists in favor of the mortgagee is illustrated in:

Titcomb v. Fonda, 38 Misc. 630;
Berdell v. Berdell, 33 Hun. 535;
Murray v. Walker, 31 N. Y. 399;
Carr v. Carr, 52 N. Y. 251.

Under the revised statutes, an action in ejectment lay for the assertion of dower rights. This was abolished by the Code, Section 1499, where it is provided that the action in ejectment can not be maintained in a case where an action for dower may be brought.

By Article of Section 1499 it is provided that no action may be maintained:

> "Where in any city, the real property consists of a strip of land not exceeding six inches in width, upon which there stands the exterior wall of a building erected partly upon said strip and partly upon the adjoining lot, and the building has been erected upon land of the plaintiff abutting on the said wall, unless said action be commenced within one year after the completion of the erection of such wall or within one year after the first day of September, 1898. But an action may be maintained, if commenced within the fur-

ther period of one year, for the recovery of damages by reason of the erection of such wall, and upon the satisfaction of the judgment for such damages, the title of the plaintiff to such strip of land shall thereby be transferred to and vest in the defendant. If neither an action of ejectment nor an action for the recovery of damages be brought within the period hereby limited therefor, the person in possession of such lands shall be deemed to have an easement in said strip of land so long as the said wall partly erected thereon shall stand, and no longer, and in case of the destruction of such wall the owner of such strip shall have the same right to take or recover the possession thereof as if such wall had never existed."

Under Section 1504 of the Code, an action may be brought for non-payment of rent, only when six months' rent or more is in arrear, and even if a lease reserving a right to enter at the end of the first month for failure to pay rent under this section of the Code, an action in ejectment can not be brought before six months had elapsed. Can this section of the Code be assailed as an unconstitutional abridgment of the original jurisdiction of the Supreme Court to maintain a possessory action at law after only one month's rent was due, which was the common law? And while the boast of the property owner is to regain possession by ejectment for non-payment of rent, and to obtain possession absolutely after default

in the payment of rent, which was his undisputed right at common law, under Section 1508 of the Code, at any time within six months after the possession of the property has been awarded to the landlord, the tenant may pay or tender to the landlord or his privy the amount in arrear, and the premises will be restored to the lessee, who will thereafter hold the premises without a new lease, subject to the terms of the original demise. Can this section of the Code be deemed unconstitutional because it stands in face of the landlord's right to maintain continued possession, which the tenant has contracted to give if he should default in his rent? This continued possession was the right of the landlord at common law, and that he should be forced to part with possession of his property within six months after the tenant had become a wrong-doer by defaulting in his rent, indicates that the codifiers had in mind greater considerations of substantial justice between the parties, than maintaining without modification and rigid rules governing possession of real property at the common law.

The provisions of the April laws, which authorized a stay for not more than one year of the dispossess warrant, and the execution of costs on the application of the tenant showing that he was unable to secure suitable similar premises in the neighborhood after due and reasonable effort and that the application was made in good faith, and that he was willing to abide by and comply with the terms prescribed for the stay, and any other facts warranting a stay upon the deposit of a rea-

sonable amount determined by the court, was amended only after chaotic condition of tenancies resulted because of the numerously different stays for varying lengths of time. A statute protecting the tenant during times of stress, was therefore found necessary by an extraordinary legislature specially called for the purpose of dealing with an increasingly aggravating problem. The mere fact that the legislature found it necessary to change the discretionary stay and allow the tenants statutory protection beyond that given by the individual judge, indicates the plight of the tenants during the months when leases expired, when the renting season was at its height, and when the process of the court to remove holdovers was exerted in an unexampled measure. A discretionary stay for a short period would only have stayed off the tremendous number of dispossesses temporarily. Substantial relief for a large part of the community was needed.

The apprehensions expressed in the opinion of Mr. Justice Laughlin in Guttag v. Shatzkin in the Appellate Division that the courts must necessarily adjudge that the laws are not only constitutional at the time of its decision, but for such further periods as the legislature may arbitrarily set, are really unfounded. When conditions arise in the future which render extraordinary legislation unnecessary, a court sitting at a future date, when the emergency and stress have ceased to exist, may find that a statute is unconstitutional at that time, although it had been held constitutional at a time when the enactment was

passed. It by no means follows that if the chapter suspending the right to maintain ejectment against holdovers in certain instances is constitutional in January of 1921, that this decision is absolute, irrevocable, and binding upon a court examining the same problem presented in 1922. Indeed the District Court of the United States in the Marcus Brown case, supra, recognized that if the emergency should no longer be a fact, a court sitting at a subsequent date, would not be compelled to follow their opinion given in December of 1920. The possibility that facts calling for unusual legislation may cease to exist within a stated period, does not argue that the emergency and the power of the state EXERCISED AT THE PRESENT TIME cannot be called into play. The courts have ruled on many occasions that an act may be constitutional at one time and unconstitutional at another when the conditions vary.

Lincoln Gas & Electric Light Co. v. Lincoln, 250 U. S. 256;

Minnesota Rate Cases, 230 U. S. 352, 473;

Wilcox v. Consolidated Gas Co., 212 U. S. 19, 54;

Municipal Gas Co. v. Public Service Commission, 225 N. Y. 89, 95.

The questions to be determined at the present hearing are whether the emergency exists and whether the power of the state has been exercised in a manner that reasonably tends to remedy cer-

tain evils which no one will deny. When the emergency has been a matter of the past and housing and building conditions are no longer a matter of grave concern to the people of the State of New York, the courts might then rightfully told that these same protective measures are unwarranted points out how a statute may become unconstitutional by reason of conditions and facts not contemplated nor susceptible of prophecy. But the possibility of a subsequent declaration of unconstitutionality is not an element in probing into the present constitutionality of a statute based upon a real existing emergency.

It is, however, a fallacy to assume that the remedy of ejectment has been absolutely suspended for more than two years. It still survives even against holdovers in four cases, which tend to promote the spirit of these emergency acts, to wit, where the tenant is objectionable, where the landlord wishes possession for his own immediate and personal use, where the landlord intends to demolish the existing structure with intent to build a new dwelling house, and where possession is sought by a stockholder in aid of a cooperative tenants' community. It may be brought against any tenant who has defaulted in his rent, and any other wrongdoer who entered unlawfully and who is either a disseisor or trespasser.

The practical application of the law necessitates a mechanism which will remedy the evil. The remedy of summary proceedings is recent in the history of possessory actions in real property. It was brought into existence by Chapter 194 of the

laws of 1820, and was by no means as comprehensive in its scope as ejectment.

Since it was a remedy first created by the legislature, it could be repealed by the legislature. (See opinion of Cullen, C. J., in Peabody v. Longacre Square Building Co., 188 N. Y. 103, 106).

With an undoubted right to the legislature to seriously modify and even abolish summary proceedings, it would be a practical nullification of that legislature action of ejectment were continued in its original form. By allowing the landlord to sue in ejectment within the twenty days, a default on the part of the tenant would deprive him of any benefits which the legislature had intended either under the present act or under the former amendment which was passed in April.

The tenant in an ejectment suit would have no defense except such as could be raised by a perjurious answer, and which no other defense but his own plight and the acknowledged hardship in finding any other habitation, judgment by default would be rendered against him, and the salutary effects of two years' labor by the State, the legislative special committee and experts would be imaginary. The modification of ejectment was therefore a practical necessity and merely a preservation of the rights of the tenant, and fortified the legislature's conceded power to amend the law relating to summary proceedings.

LAST POINT.

The order of the District Court dismissing the bill should be affirmed.

Respectfully submitted,

SAMUEL R. GERSTEIN,
Attorney for Tenants-Appellees.

DAVID L. PODELL,
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Of Counsel.

No. 731

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MAR 1 1921
JAMES D. MAHER
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Argued by JOHN CALDWELL MYERS.

Supreme Court of the United States.

October Term, 1920.

MARCUS BROWN HOLDING CO.,
Appellant,

against

MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ and EDWARD SWANN, as District Atttorney of the County of New York in the State of New York.
Appellees.

On Appeal from the District Court of the United States for the Southern District of New York.

BRIEF FOR APPELLEE,

EDWARD SWANN, AS DISTRICT ATTORNEY, ETC.

ROBERT S. JOHNSTONE,
Solicitor for Appellee, EDWARD SWANN, as District Attorney, etc.

JOHN CALDWELL MYERS,
Of Counsel.

B. H. TYRRELL, PRINTER, 206-8 FULTON STREET, NEW YORK.

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Supreme Court of the United States.

OCTOBER TERM, 1920.

MARCUS BROWN HOLDING CO.,
Appellant,
against

MARCUS FELDMAN and BENJAMIN SCHWARTZ and FRANK SCHWARTZ and EDWARD SWANN, as District Attorney of the County of New York in the State of New York,
Appellees.

BRIEF FOR APPELLEE, EDWARD SWANN, as District Attorney, etc.

Statement.

This case comes before this Court on a direct appeal by the complainant from an order of the District Court of the United States for the Southern District of New York dismissing a Bill of Complaint in Equity. The District Court was constituted of Hough, C. J., and Mayer and Augustus N. Hand, D. JJ., pursuant to the provisions of Section 266 of the Judicial Code.

The Bill of Complaint.

The suit was brought to enjoin the enforcement of certain statutes enacted by the Legislature of the State of New York, commonly known as The Housing Laws.

Among these statutes is Chapter 951 of the Laws of 1920, which amends Section 2040 of the Penal Law, to read as follows:

> "Sec. 2040. Willful violation of the terms of a lease: Any lessor, agent, manager, superintendent or janitor of any building, or part thereof, the lease or rental agreement whereof by its terms, expressed or implied, requires the furnishing of hot or cold water, heat, light, power, elevator service, telephone service or any other service or facility to any occupant of said building, who willfully or intentionally fails to furnish such water, heat, light, power, elevator service, telephone service or other service or facility at any time when the same are necessary to the proper or customary use of such building, or part thereof, or any lessor, agent, manager, superintendent or janitor who willfully and intentionally interferes with the quiet enjoyment of the leased premises by such occupant, is guilty of a misdemeanor."

The relief sought against the Defendant, Edward Swann, as District Attorney, etc., is an injunction restraining him from prosecuting the complainant for any violation of the foregoing statute.

The complainant made a motion for an injunction and its motion was heard by the District Court constituted as prescribed by Section 266 of the Judicial Code.

The Motion to Dismiss.

The defendant, Edward Swann, as District Attorney, etc., made a motion to dismiss the bill of complaint for the following reasons and upon the following grounds:

1. That it does not appear upon the face of the Bill of Complaint that the matter in controversy exceeds exclusive of interests and costs, the sum or value of Three Thousand Dollars, except by bare allegation to that effect which allegation is not sustained or justified by any facts alleged in the Bill of Complaint.

2. That it appears upon the face of the Bill of Complaint that the facts stated are insufficient to constitute a cause of action in equity.

3. That it appears upon the face of the Bill of Complaint that the complainant has a plain, adequate and complete remedy at law.

4. That it does not appear upon the face of the Bill of Complaint and no sufficient facts are averred therein to show that the intervention of a Court of Equity or the assumption of jurisdiction by such a Court is necessary or essential in order effectually to protect the property or rights of property of the complainant from great and irreparable injury or from any injury whatever.

5. That if the Bill of Complaint were reframed under Section 274A of the Judicial Code and the cause permitted to proceed as an action of ejectment or other action at law, the defendant, Edward Swann, as District Attorney, etc., would not be either a proper party or a necessary party to such action, as no relief could be obtained against him therein.

6. That each and all of the statutes referred to in the Bill of Complaint, including Chapter 951 of the Laws of 1920 (amending Section 2040 of the Penal Law) is a valid enactment passed by the Legislature of the State of New York in due exercise of its law-

ful and constitutional powers; and it does not appear upon the face of the Bill of Complaint, or from the facts averred therein, that the said statutes, or any of them, or the enforcement thereof by the State of New York by and through its governmental and administrative agencies, operate or will operate to deprive the complainant of liberty or any property or rights of property without due process of law.

7. That it appears upon the face of the Bill of Complaint that to grant the relief sought by the complainant would constitute an unlawful and unconstitutional interference by the agencies of the Federal Government with the lawful and constitutional power and right of the State of New York and its governmental agencies to prosecute violations of a criminal statute of the State of New York.

8. That it appears upon the face of the Bill of Complaint that this court is without power or authority to grant the relief or to render the judgment and decree prayed for against the defendant Edward Swann as District Attorney of the County of York.

9. That no sufficient facts are alleged in the Bill of Complaint to warrant or justify the granting of the relief prayed for or any other relief, whether equitable or otherwise, either in equity or at law, against the defendant Edward Swann, as District Attorney of the County of New York."

The motion to dismiss was heard at the same time as the motion for an injunction.

POINT I.

The District Court had no jurisdiction to entertain the suit as it did not appear that the matter in controversy exceeded three thousand dollars.

The bill of complaint alleges that in 1917 the complainant's predecesor in title leased an apart-

ment in the premises at No. 215 West 91st Street, in the City of New York, to the defendants, Feldman and Schwartz, for a term of three years, expiring on September 30, 1920 (fols. 73, 74); but there is no allegation showing the rental fixed in the lease.

An affidavit filed in support of the motion for an injunction and made by Joseph A. Seidman, Solicitor for the Complainant, alleges that on or about the 26th day of February, 1920, the complainant's predecessor in title leased the premises in question to one Benjamin Goldsmith for a term of five years, beginning on October 1, 1920, at the annual rental of $3,800 (fols. 33, 34). The bill itself does not contain any allegation that the premises have been leased from and after October 1, 1920, to Benjamin Goldsmith or any other person for the rental of $3,800, or for any other rental.

Prior to the bringing of this suit the complainant brought another suit against Arnold Pollak and Edward Swann, as District Attorney, etc., seeking substantially the same relief as is sought in this case, Pollak being in possession of another apartment in the premises No. 215 West 91st Street, Borough of Manhattan, City of New York, under a lease made in 1918 and expiring on September 30, 1920.

The bill of complaint in the Pollak case alleged that the lease to Pollak was for the annual rental of $1,600, and that a lease of the same premises had been made to one Minnie R. Griffen for a term of three years, beginning October 1, 1920, at a rental of $2,300 per year.

In the Pollak case the defendant, Edward Swann, as District Attorney, etc., moved to dismiss the bill for want of jurisdiction on the ground

that the amount in controversy did not exceed, exclusive of interest and costs, the sum or value of three thousand dollars.

That motion was based upon the ground that the case was one arising under the Constitution and Laws of the United States within the meaning of subdivision 1 of Section 24 of the Judicial Code, and was not a suit to redress the deprivation of a right within the meaning of subdivision 14 of Section 24 of the Judicial Code.

The motion of the defendant, Edward Swann, as District Attorney, etc., was granted by a divided court, and the bill was dismissed, the court holding that the case was governed by the provisions of subdivision 1 of Section 24 of the Judicial Code, and that there was at stake in the controversy nothing more than complainant's loss by Pollak's continued occupation for twenty-five months, because after that time the moratorium would expire and all landlords might re-enter. The court computed that the amount in controversy was the difference between the rental in the Pollak lease of $1,600 per year and the rental in the Griffen lease of $2,300 per year for a period of twenty-five months; such difference being $1,458.33. (*Marcus Brown Holding Co.* v. *Pollak*, not yet reported).

In the case at bar the complainant attempts to bring the case within the jurisdiction of the District Court, notwithstanding the decision in the Pollak case, by alleging that its property has diminished in value in an amount exceeding the sum of $100,000; by alleging that the State statutes, which are attacked, impose no obligation of any kind upon the person occupying the premises to remain or continue in possession during the period of twenty-five months commencing October 1,

1920, and ending November 1, 1922; and by alleging that the said statutes render the complainant unable to enforce in the judicial tribunals of the State of New York rights secured to it as a citizen of the United States by the Constitution of the United States and by the Civil Rights Act (fols. 94-100). (R. S. Sections 1977, 1979; U. S. Comp. Stat. Section 3925, 3932).

There is no allegation in the bill of complaint as to the rental fixed in the lease to the defendants Feldman and Schwartz, or as to the rental fixed in the lease to Benjamin Goldsmith. In the affidavit which was made by complainant's solicitor in support of the motion for an injunction, there is an allegation that the rental in the Goldsmith lease is $3,800 per annum (fol. 34); but there is no allegation as to the rental fixed in the lease to the defendants, Feldman and Schwartz. We submit that in spite of the effort that the complainant has made to bring the case within the jurisdiction of the District Court, it has not succeeded in so doing.

The bill contains the formal allegation "That the matter in controversy is in excess of the sum of Three Thousand Dollars ($3,000), exclusive of interest and costs; that the value of the use and occupation of the premises herein described and wrongfully used and occupied by the defendants, Marcus Feldman, Benjamin Schwartz and Frank Schwartz, is in excess of Three Thousand Dollars ($3,000)" (fols. 110, 111). But no facts are alleged to show that the matter in controversy actually does exceed the sum of Three Thousand Dollars ($3,000).

The allegation that the complainant's property has diminished in value to an amount in excess of the sum of One Hundred Thousand Dollars ($100,-

000) (fols. 97, 98) does not avail to bring the case within the jurisdiction of the District Court. Applying the rule laid down in the Pollak case, there is possibly at stake nothing more than the plaintiff's loss by defendants' continued occupation of the leased apartment for 25 months; and there is no allegation which will enable the Court to ascertain the value of that occupation or to ascertain the loss the complainant may sustain by reason of such continued occupation.

The answer of the defendants Feldman and Schwartz shows that their rental is $2,100 per year (folio 214); but the bill does not allege a lease to anyone else at a higher rental. Furthermore, the answer of the defendants Feldman and Schwartz (folio 236) alleges that they have been at all times ready, able and willing to pay an increased rental for the purpose of retaining possession of the leased premises, and that they so informed the complainant, but that their offer was refused. The complaint alleges (folio 109) that the complainant would be liable to fines exceeding the sum of $3,000; but this is sheer speculation, and not an allegation of a fact. Section 2040 of the Penal Law, which the complainant alleges is unconstitutional, makes violation of its provisions a misdemeanor but does not otherwise prescribe the punishment. Section 1937 of the Penal Law provides that a misdemeanor for which no other punishment is specially prescribed is punishable by imprisonment for not more than one year or by a fine of not more than $500, or by both.

The first subdivision of section 24 of the Judicial Code provides that the District Courts of the United States shall have original jurisdiction of all suits of a civil nature, at common law or in equity,

> "Where the matter in controversy exceeds, exclusive of interest and costs, the sum or value three thousand dollars and (a) arises under the Constitution or laws of the United States, * * * Provided, however, that the foregoing provision as to the sum or value of the matter in controversy shall not be considered to apply to any of the cases mentioned in the succeeding paragraphs of this Section."

The fourteenth subdivision of Section 24 of the Judicial Code reads as follows:

> "Fourteenth: Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

We submit that the questions arising in this suit are questions arising under the Constitution or laws of the United States, within the meaning of subdivision one of Section 24 of the Judicial Code, and that this is not a suit to redress the deprivation under color of a statute of any right, privilege or immunity secured by the Constitution or laws of the United States, providing for equal rights of citizens of the United States, within the meaning of Subdivision 14 of Section 24 of the Judicial Code, and that therefore the District Court had no jurisdiction of the suit, it not appearing by the bill of complaint that the matter in controversy was more than Three Thousand Dollars. Under subdivision 1 of Section 24 of the Judicial Code there must not only be the question arising under

the Constitution or laws of the United States, but the matter in controversy, exclusive of interest and costs, must exceed the value or sum of Three Thousand Dollars.

In *Holt* v. *Indiana Manufacturing Co.*, 176 U. S. 68, this Court, in construing the section of the Revised Statutes from which Subdivision 14 of Section 24 of the Judicial Code has been derived, held that it referred to civil rights only, and that, treating the suit under consideration as a case under the Constitution and laws of the United States, the Circuit Court had no jurisdiction because the amount in controversy did not exceed the sum or value of Two Thousand Dollars—Two Thousand Dollars, instead of Three Thousand Dollars being then the jurisdictional minimum for suits brought in the Circuit Court.

The decision in the *Holt* Case was followed by the District Court of Arizona in *Simpson* v. *Geary*, 204 Fed. 507, wherein it was sought to enjoin the enforcement of an Arizona statute requiring all flagmen on railroad trains to have at least one year's experience as brakeman. The Court dismissed the bill for want or jurisdiction, saying at pp. 511-512:

> "That case [the Holt case] was brought to enjoin the collection of certain personal taxes based upon an assessment upon the value of certain rights secured under Letters Patent of the United States. It was held by the Supreme Court that the Circuit Court did not have jurisdiction of the case. The term 'civil rights' was not defined nor was it necessary. The civil rights which it is the purpose of this statute to protect are only those rights, privileges, and immunities secured by the Constitution of the United States, or some law of the United States passed in pursuance of Consti-

> tutional authority. * * * The right to contract for and retain employment in a given occupation or calling is not a right secured by the Constitution of the United States, nor by any constitution. It is primarily a natural right, and it is only when a State law regulating such employment discriminates arbitrarily against the equal rights of some class of citizens of the United States, or some class of persons within its jurisdiction, as for example, on account of race or color, that the civil rights of such persons are invaded and the protection of the Federal Constitution can be invoked to protect the individual in his employment or calling. The complainant's case is not within this protection. They have not been deprived of any of the equal rights of citizens or persons. The State law applies to all persons alike, without discrimination, whether citizens of the United States or persons within its jurisdiction, and it is plainly a regulation enacted under the Police Power of the State, having for its purpose the safety of passengers on the railways operating within the State."

In *Salander* v. *City of Tacoma*, 208 Fed. 427, which was an action to recover One Hundred Dollars from the defendant, alleged to have been paid under compulsion and protest by the plaintiff as a license imposed by what he asserted to be a void city ordinance, the court dismissed the action for want of jurisdiction, saying, at page 429:

> "This suit is rather one which arises under the 'Constitution and laws of the United States,' as provided in the first paragraph of Section 24, where there must be the jurisdictional amount involved to give jurisdiction, than one 'authorized by law' to redress the deprivation of a right, privilege, or immunity secured by the Constitution of the United States."

In the *Virginia Coupon Cases*, 114 U. S. 317, subdivision 16 of Section 629 of the Revised Statutes, which is the predecessor of subdivision 1 of Section 24 of the Judicial Code, was held not to apply under the following circumstances: The plaintiff sued on the case for a wrongful tax levy and alleged that he had paid his taxes in coupons of Virginia bonds and that the Public Officers had refused to accept such coupons, in violation of Article 1, Section 10 of the Contitution,—*i. e.*, the impairment clause. The court held that his right so to pay in coupons was not a right directly secured by the Constitution and that the only mode of raising that question was by writ of error from the Supreme Court to judgments of the State Courts, in which his constitutional rights were disregarded, or under the precursor of Subdivision 1 of Article 24 of the present Judicial Code, upon which there was a jurisdictional limit dependent upon the amount in controversy.

It is true that in *Raich* v. *Truax*, 219 Fed. 273 (*aff. sub. nom. Truax* v. *Raich*, 239 U. S. 33) the District Court of Arizona held that it had jurisdiction to entertain a suit for an injunction restraining the enforcement of an Arizona statute. But the statute involved in that case discriminated against *aliens* in the matter of employment, and therefore the suit was one to redress the deprivation of equal or civil rights within the meaning of subdivision 14 of Section 24.

The allegations in the bill of complaint in the case at bar that the complainant is being deprived of rights secured by R. S. 1977 and therefore is entitled to the relief provided for by R. S. 1979, are simply statements of conclusions. No facts are alleged to show that the complainant is entitled to invoke the statutes referred to.

The sole purpose of subdivision 14 of Section 24 of the Judicial Code was to give the District Court jurisdiction, irrespective of the amount of controversy, over suits brought to redress the deprivation of civil rights secured by R. S. Sections 1977, 1979.

Farson v. *City of Chicago*, 138 Fed. 184, 185.

And the Court held in the *Pollak* case (not yet reported) that subdivision 1 of Section 24, and not subdivision 14 of Section 24 of the Judicial Code, was controlling on the question of jurisdiction involved in that case.

In *Virginia* v. *Rives*, 100 U. S. 313, it was held that the object of R. S. 1977 was to place the colored race, in respect to civil rights, on a level with whites, and to make the rights and responsibilities, civil and criminal, of the two races, exactly the same.

R. S. 1979 does not permit a Federal Court to entertain a bill to restrain an action in a State Court, though the case involves the constitutional right of due process of law.

Aultman & Taylor Co. v. *Brumfield*, 102 Fed. 7, 12; appeal dismissed in 22 Supreme Court Rep. 938.

The rights, privileges and immunities which that Section was designed to protect are such as belong to citizens of the United States as such, and not as citizens of a State.

Wadleigh v. *Newhall*, 136 Fed. 941.

They do not include the right of individuals to life, liberty and property, which are primary rights within the jurisdiction of the State.

Brauner v. *Irwin*, 169 Fed. 964.

POINT II.

The complainant has a plain, adequate and complete remedy at law.

We take it to be a self-evident proposition that a court of equity will not enjoin the enforcement of a criminal statute unless it is clearly shown that the complainant is entitled to relief by injunction. And we take it to be equally self-evident that a Federal Court will not interfere with the enforcement by a State of a criminal statute, which the State has enacted for the protection of its own citizens, unless a case is made out which convinces the Court that it is its duty so to interfere.

As the Court said in *Ex parte Young*, 209 U. S. 123, 166, 167:

> "No injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by the Judges of the Federal Courts."
>
> "It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against the proceedings in compliance therewith but it must appear that he has no adequate remedy by the ordinary processes of law or that the case falls under some recognized head of equity jurisdiction."
>
> *Cruickshank* v. *Bidwell*, 176 U. S. 73, 80.

The complainant must show that the statute is unconstitutional, that the injunction is essential to the safeguarding of property rights (*Truax* v. *Raich*, 239 U. S. 33-38), and that a plain, adequate and complete remedy may not be had at law (Judicial Code 267).

The statute as to adequate remedy "certainly means something; and if only declaratory of what

was always the law, it must at least have been intended to emphasize the rule, and to impress it upon the attention of the courts."

Cruickshank v. *Bidwell*, 176 U. S. 73, 81, *quoting New York Guaranty Co.* v. *Memphis Water Co.*, 107 U. S. 205, 214.

If we assume, for the sake of argument, that Chapter 951 of the Laws of 1920 is unconstitutional, we submit that the complainant is not entitled to an injunction against the defendant Edward Swann, as District Attorney, etc., for the reason that it has a plain, adequate and complete remedy at law. In the event that any criminal proceedings are instituted against the complainant for its violation of the statute in question, it may test the constitutionality of the statute by setting up the unconstitutionality of the statute as a defense to the criminal proceedings. The question is a simple one, namely, whether the statute is a valid exercise of the State's police power. This question can be tried and determined as easily and as fully in a criminal prosecution as in an equity suit. It is a question of law, pure and simple, and does not involve an inquiry into any questions of fact. It is wholly unlike an inquiry into the reasonableness of rates for a public service corporation which have been fixed by statutes, which inquiry would involve complicated questions of fact.

The case at bar is clearly distinguishable from the case of *Ex parte Young*, 209 U. S. 123. In the *Young* case it was held that the question of whether a State statute was unconstitutional because the penalties for its violations were *so enormous* that persons affected thereby were prevented from resorting to the courts for the pur-

pose of determining the validity of the statute and were thereby denied the equal protection of the law and their property rendered liable to be taken without due process of law was a Federal question and gave the Circuit Court jurisdiction. It was further held in that case that no adequate remedy at law, sufficient to prevent a court of equity from acting, existed in a case where the enforcement of an unconstitutional State rate statute required the complainant to carry merchandise at confiscatory rates if it complied with the statute and subjected it to excessive penalties in case it did not comply therewith and its validity was finally sustained. In the course of its opinion in the *Young* case, the Court said, at pages 147, 148:

> "Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act

depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the Legislature is complete in any event."

Chapter 951 of the Laws of 1920 relates to a subject over which the jurisdiction of the Legislature is complete in any event. The subject is the protection of the health of the people of the State of New York. The statute is not confiscatory, and does not do irreparable injury to the persons effected thereby; and no injunction is necessary to safeguard property rights.

Chapter 951 does not deprive landlords of the right to eject trespassers or to eject tenants who have failed to perform the obligations of their contracts.

The sole effect of the statute under consideration is to prevent a landlord and his servants from doing certain things, which things the statute declares to be unlawful, for the purpose of coercing tenants or occupants into quitting the landlord's premises. The acts prohibited are, in the main, ones which, if committed by the landlord, would tend to impair or to affect injuriously the health of the tenants. We submit it is fully as competent for the Legislature of the State of New York to forbid a landlord to rid himself of his tenants by coercive measures, injuriously affecting their health, as it would be for the Legislature to forbid him to rid himself of his tenants by committing a physical personal assault upon them.

Chapter 951 is a valid exercise of the State's police power for the purpose of protecting the health of its citizens. The statute does not compel

a landlord to permit trespassers to remain in possession of the landlord's premises. It merely provides that so long as an occupant remains in the leased premises and the lease requires the landlord to furnish heat, water, etc., the landlord or his servants shall not endanger the health of the occupant by refusing to furnish such heat, water, etc. If the occupant is wrongfully in possession of the premises, the landlord's remedy is to get rid of the occupant by due process of law. If there is another statute which unlawfully deprives the landlord of his civil remedy to dispossess the tenant, the landlord's attack should be directed against such other statute and should not be directed against the penal statute which makes perfectly reasonable and lawful provision for the health and comfort of the occupants of the landlord's premises.

In the *Pollak* case the bill of complaint alleged that prior to the commencement of the suit the complainant was advised by defendant, Edward Swann, as District Attorney, etc., that if it interfered with the quiet enjoyment and occupation of the premises by the defendant, Pollak, the complainant would be prosecuted and charged with the commission of a misdemeanor. The prevailing opinion in the *Pollak* case calls attention to the fact that "it does not appear that Swann has threatened six prosecutions, or indeed anything more than a single one."

In the case at bar the bill of complaint alleges that the defendants have advised the complanant that if it should attempt to interfere with the use and enjoyment of the premises by the defendants it "would be charged with the commission of a misdemeanor and prosecuted separately for each and every act so done or committed in violation of the said statute."

Since no answer has been interposed, but merely a motion to dismiss the bill of complaint, the allegations just quoted must, of course, *for the purpose of this argument*, be taken to be true.

The statute under consideration has not been construed in any reported decision. We think it probable, however, that the proper construction of the statute is that if a prosecution is instituted for a refusal extending over a number of days, weeks or months, there can be a conviction only as for a single offense, but that if the landlord after conviction for a violation of the statute willfully persists in continuing to refuse to furnish heat and water, etc., the prior conviction will not bar any other prosecution for subsequent willful violations of the statute.

But we submit that it makes little difference in the case at bar whether the offense created by the statute is a continuing one, for which there can be only one prosecution, or whether each separate refusal is a separate and distinct offense, for which a separate and distinct prosecution will lie. No matter which construction of the statute is proper, there does not exist that danger of a multiplicity of prosecutions which would justify a court of equity in granting an injunction against the enforcement of the statute. In the case of a public service corporation whose rates are fixed by a penal statute, there is danger of a multiplicity of prosecutions arising out of transactions between the corporation and innumerable persons—between the corporation and the public at large. In the case at bar the only danger to which the complainant is subjected is that of prosecution on account of its refusal to furnish heat, etc., to a single person, namely, the defendant, Feldman. The Statute does not impose any duty upon the

complainant in respect to the public at large, and there is no allegation in the bill that any of the complainant's tenants other than the defendants is in a situation similar to that of the defandants.

Furthermore, it is not necessary for the complainant to violate the statute in order to continue its ordinary and usual relations with the tenants or occupants of its building. The complainant is not compelled to choose between compliance with the law at a loss and violating the law and incurring the penalties provided for such violations.

Where a penal statute fixes the rates of a public service corporation, the corporation, if it is to continue in business, must either render services for the reduced statutory rates, which may be in fact confiscatory, or must demand higher rates in violation of the law and thereby run the risk of incurring penalties in innumerable cases, which, when accumulated, will amount to the taking of the corporation's property without due process of law (See *Ex parte Young*, 209 U. S. 123, 163). All that the complainant has to do in the case at bar, in order to avoid prosecution, is to refrain from using unlawful coercive measures to compel the defendants to quit the complainant's premises.

Another distinction between the case at bar and the *Young* case is that in this case the question of whether the statute is constitutional is merely one of law, namely, whether it is a valid exercise of the police power of the State of New York; whereas, in the *Young* case the validity of the statute depended upon the reasonableness of the rates fixed by the statute, and that question could not be tried out as fully and as fairly in a criminal prosecution as in an equitable proceeding.

In *Ex parte Young*, 209 U. S. 123, 164, 165, the Court said:

> "It would not be wonderful if, under such circumstances, there would not be a crowd of agents offering to disobey the law. The wonder would be that a single agent should be found ready to take the risk.
>
> "If however, one should be found and the prosecutor should elect to proceed against him, the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter. Questions of the cost of transportation of passengers and freight, the net earnings of the road, the separation of the cost and earnings, within the State from those arising beyond its boundaries, all depending upon the testimony of experts and the examination of figures relating to these subjects, as well, possibly, as the expenses attending the building and proper cost of the road, would necessarily form the chief matter of inquiry, and intelligent answers could only be given after a careful and prolonged examination of the whole evidence, and the making of calculations based thereon. All material evidence having been taken upon these issues, it has been held that it ought to be referred to the most competent and reliable master to make all needed computations and to find therefrom the necessary facts upon which a judgment might be rendered that might be reviewed by this court. *Chicago & C. Railway Co.* v. *Tompkins*, 176 U. S. 167. From all these considerations it is plain that this is not a proper suit for investigation by a jury. Suits for penalties, or indictment or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate opportunity for the presentation

of a defense founded upon the assertion that the rates were too low and therefore the act invalid.

"We do not say the company could not interpose this defense in an action to recover penalties or upon the trial of an indictment (*St. Louis etc. Ry. Co.* v. *Gill*, 156 U. S. 649), but the facility of proving it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible."

In *Raich* v. *Truax*, 219 Fed. 273, 283, the Court said:

"We think the position taken by respondents that the institution of a criminal proceeding against the respondent Truax in the State Courts will afford ample means of determining judicially the rights of the complainant in the case at bar is untenable. The complainant is not a party to any such criminal proceedings, nor can he be made a party thereto; nor can he be heard therein, nor can he be in any legal sense secure, or require that his legal rights be determined therein. If he cannot secure his legal rights in a court of equity, he cannot secure them at all; for he is powerless to secure them in any legal proceedings that have been or can be instituted under this law, and he cannot secure them in any action at law for damages. It cannot be successfully contended that he has no legal rights. It is axiomatic that every man within the territorial jurisdiction is entitled to his day in court. This complainant can have no day in court, save in a Court of Equity."

In the case at bar, the complainant is not in the position in which Raich was in the case of *Raich* v. *Truax*, as this complainant *would* be a party to a criminal prosecution instituted for its violation of the statute.

POINT III.

Chapter 951 of New York Laws of 1920 is a valid exercise of the State's police power.

> "The State has, no doubt, power to protect the health of its people and to impose restrictions, having reasonable relation to that end. The nature and extent of restrictions of this character are matters for the legislative judgment in defining the policy of the State and the safeguards required."
>
> *Price* v. *Illinois*, 238 U. S. 436, 451.

The police power is not subject to definite limits but is co-extensive with the necessities of the case and the safeguarding of public interests. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health.

> *Sligh* v. *Kirkwood*, 237 U. S. 55, 59.

See also *Chicago, etc., R. Co.* v. *Tranbarger*, 238 U. S. 67, wherein the Court said:

> "It is established by repeated decisions of this Court that neither of these provisions of the Federal Constitution (contract clause and due process clause) has the effect of over-riding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant; and that all contracts and property rights are held subject to its fair exercise. * * * And it is also settled that the police power embraces regulations designed to promote the public convenience or

> the general welfare and prosperity as well as those in the interest of the public health, morals or safety."

In *Manigault* v. *Springs*, 199 U. S. 473, 480, the Court said:

> "The interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

In *Tenement House Department* v. *Moschen*, 179 N. Y. 325, it was held that a statute requiring all school sinks, privy vaults, etc., in existing tenements in cities of the first class to be removed and replaced by individual water closets, was a proper and constitutional exercise of the police power of the State for the protection of the public health.

It seems to us to be wholly unnecessary to cite any further authorities or to make any elaborate argument in regard to the scope of the State's police power.

If a mere examination of the terms of Chapter 951 of the Laws of 1920 does not convince the Court that the statute is a valid exercise of the State's police power, no amount of argument could have that effect. We submit that the State of New York has an undoubted power to protect the health of its people at all times; that it is par-

ticularly proper for the State to exercise this power in time of a great emergency like the one which exists at present in respect to housing conditions; and that the statute making it a misdemeanor for a landlord to do things which are calculated to impair the health of the occupants of the leased premises or to interfere with their reasonable and proper enjoyment of the premises is a proper and reasonable exercise of such power. The nature and extent of the restrictions which the Legislature sees fit to impose upon the landlord's right to use his property as he sees fit "are matters for the Legislative judgment in defining the policy of the State and the safeguards required."

IN CONCLUSION.

The order appealed from should be affirmed.

Respectfully submitted,
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March, 1921.

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Supreme Court of the United States.

OCTOBER TERM, 1920, No. 731.

MARCUS BROWN HOLDING COMPANY,
Plaintiff-appellant,

v.

MARCUS FELDMAN, BENJAMIN SCHWARTZ, FRANK SCHWARTZ, and EDWARD SWANN, District Attorney of the County of New York,
Defendants-appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE ATTORNEY-GENERAL AND THE JOINT LEGISLATIVE COMMITTEE ON HOUSING OF THE STATE OF NEW YORK IN SUPPORT OF THE CONSTITUTIONALITY OF THE EMERGENCY HOUSING LAWS ENACTED SEPTEMBER 27, 1920 (chapters 942 to 953, L. 1920).

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Supreme Court of the United States,

OCTOBER TERM, 1920, No. 731.

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Plaintiff-appellant,

v.

MARCUS FELDMAN, BENJAMIN SCHWARTZ, FRANK SCHWARTZ and EDWARD SWANN, District Attorney of the County of New York,
Defendants-appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE ATTORNEY-GENERAL AND THE JOINT LEGISLATIVE COMMITTEE ON HOUSING OF THE STATE OF NEW YORK IN SUPPORT OF THE CONSTITUTIONALITY OF THE EMERGENCY HOUSING LAWS ENACTED SEPTEMBER 27, 1920 (chapters 942 to 953, L. 1920).

The present appeal submits for review a decree of the United States District Court for the Southern District of New York dismissing a bill challenging the constitutionality of the Emergency Housing Laws passed at an Extraordinary Session of the Legislature of the State of New York on September 27, 1920, being chapters 942 to 953, inclusive, of the laws of 1920. A court of three judges convened below pursuant to section 266 of the Judicial Code, and upheld the laws as constitutional, the opinion being delivered by Circuit Judge Hough. This opinion is printed at p. 92 *et seq.* of the pamphlet of opinions upon the constitutionality of these laws submitted herewith. It has not yet been reported.

The pamphlet of opinions referred to contains the decisions heretofore rendered in the State of New York

upon the subject, and these need not be further referred to now. It is sufficient for the moment to add that the principal questions involved have been argued in the New York Court of Appeals in cases which are now pending there under advisement.

STATEMENT.

The plaintiff owns an apartment house in the City of New York, and the defendants except Swann are its tenants. The latter is the District Attorney in and for the County of New York. The defendants, occupying an apartment in the plaintiff's tenement, formerly held under a lease, but the term thereof expired October 1, 1920, and they are now holding over without any lease. They have at all times been able and willing to pay a fair and reasonable rental; but the plaintiff, desiring to obtain more, has refused their offer, and insists that they quit and surrender the premises forthwith. The defendants have diligently endeavored to find other premises to remove to, but have been unable to find any because of the serious shortage of housing space in the City of New York and its environs. It is not claimed that the tenants are objectionable, or that the landlord wishes to demolish the building in order to rebuild. In fact, no reason is assigned by the plaintiff for requiring possession during the existing serious shortage of housing, except that the tenants' term has expired and the landlord would prefer to let to a new tenant.

The plaintiff moved in the court below for a preliminary injunction against the defendant tenants directing them to remove from the premises forthwith. The court recognized that this was in effect but an ejectment action in the guise of an equity suit; but, nevertheless, concluded that, in any aspect, the proceeding was unfounded, and,

therefore, dismissed the bill, inasmuch as it would have been wholly futile to have transferred this part of the cause to the common law side of the court. In other words, the District Court held that whether considered as an action at law or suit in equity, in view of its opinion that the statutes in question were valid, it could serve no useful purpose to retain the bill.

The defendant District Attorney was joined as a party because chapter 951 of the laws of 1920 made it a crime for a landlord to refuse heat, light, water, elevator service, etc., to tenants. The plaintiff claimed that this enactment exposed it to the possibility of innumerable prosecutions if it failed or refused to comply therewith, and, therefore, prayed equitable relief against the defendant Swann. The court below declared chapter 951 a valid police regulation, and, accordingly, dismissed that portion of the bill of complaint as well.

The bill was multifarious, but the court below ruled that the due and convenient administration of justice justified the joinder. In view of the public importance of the subject matter of the litigation and the imperative necessity of a speedy and authoritative decision of the merits of the controversy, it seemed to it proper to decide the merits without regard to technical questions of jurisdiction and procedure.

As required by section 266 of the Judicial Code, notice of the application for the injunction was given to the Governor and the Attorney-General of the State of New York, and thereafter the Attorney-General designated the undersigned Special Deputy Attorneys-General to appear in defense of the statutes challenged. In this respect he acted pursuant to section 68 of the Executive Law of New York which makes it "the duty of the At-

torney-General to appear . . . in support of the constitutionality of such statute." This brief is, therefore, submitted on behalf of the Attorney-General of the State of New York, and it is also submitted on behalf of the Joint Legislative Committee on Housing of the State which formulated and recommended the legislation now in question.

The statutes involved in the above appeal are results of the serious housing shortage and crisis brought on by the World War. The nature and extent of this emergency are discussed in detail below. The crisis was painstakingly investigated for many months by the Governor of the State of New York and a Joint Legislative Committee; and it was found to be so serious and urgent in character as to require the calling of an extraordinary session of the Legislature. At this session, the legislation in question was passed, the Legislature and the Governor solemnly declaring in and by these enactments that an emergency existed which required prompt remedial legislation. The fact of a country-wide shortage in housing facilities and a particularly acute crisis in the City of New York were conceded by all the judges who have written on the subject. The existence of the emergency or crisis in housing in the City of New York and the vicinity ought, indeed, to be a matter for judicial notice and beyond question in the case at bar. *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303; *Price* v. *Illinois*, 238 U. S. 446, 452; *Matter of Stubbe* v. *Adamson*, 220 N. Y. 459, 469-70.

The two serious and acute consequences of the emergency were (1) widespread extortion and oppression in rents, and (2) wholesale evictions of tenants who were able and willing to pay fair and reasonable rentals for

their homes and were unable to find other accommodations. The statutes in question were designed to remedy these evils and to prevent the injury to the public health, peace, order and welfare which was thus threatened. The purpose of the Legislature was solely to prevent oppression of a large part of the public and to compel fair and reasonable rents. It did not authorize any tenant to occupy premises without paying rent. It merely declared that for the public interest it was necessary that, during a serious and widespread emergency, no landlord should be permitted to exact unreasonable rentals and compel oppressive agreements therefor, or be permitted to evict unobjectionable and paying tenants who, in view of the shortage, could find no other homes.

The Governor had certified to the Legislature in his message of September 20, 1920, that approximately one hundred thousand notices to quit had been given in the City of New York for October 1, 1920. This meant that one hundred thousand families, that is, between four and five hundred thousand men, women and children—present residents and citizens of the State of New York—were in danger of being immediately dispossessed and evicted from their homes without other available shelter. It was likewise essential that the power to evict during the critical period of shortage should be suspended, if the effort to secure fair and reasonable rentals was not to be an utter delusion and failure. Obviously, any tenant, aware of the landlord's power to evict him, would be constrained or coerced to pay whatever rent was demanded in order to preserve his home and present shelter. The threat of eviction necessarily would drive him into submitting to extortion. The landlord would immediately dispossess the tenant who resisted, and the

latter would then not be able to find any shelter. Under such circumstances, an act forbidding oppressive leases and unreasonable rentals and designed to protect citizens in their homes would, in practical effect, be a dead letter, if the landlord was to be left free, on the termination of any monthly or yearly tenancy, to evict by summary proceeding or action of ejectment a tenant who was unobjectionable and ready and willing to pay the fair rental value of the property occupied by him for dwelling purposes.

I.

THE NATURE AND PROVISIONS OF THE EMERGENCY HOUSING LAWS NOW IN QUESTION.

At the extraordinary session of the Legislature of the State of New York held in September, 1920, twelve bills were enacted into law in order to meet an existing housing crisis. These bills constitute chapters 942 to 953, inclusive, of the laws of 1920. As they bear upon each other and all were part of the same remedial plan, they must be considered as *in pari materia*. They are printed in full in the appendix to this brief, together with the explanations submitted to the Legislature by the Joint Legislative Committee on Housing. They may be summarized as follows:

1. Chapter 942 regulates hold-over summary dispossess proceedings upon the expiration of a term. Its purport and effect are accurately stated in the official explanation submitted with the bill by the Joint Legislative Committee on Housing and printed in the appendix at p. 152. Briefly stated, this law allows a landlord to dispossess a hold-over tenant for four reasons only, namely: (1)

where the tenant is objectionable, (2) where the owner desires the premises for his own use, (3) where he wishes to demolish and rebuild, and (4) where the building is to be taken over by a coöperative ownership group.

2. Chapter 943 is of secondary importance. It regulates stays on appeals from final orders in summary dispossess proceedings. Prior to its enactment it had been found that in hold-over summary proceedings a tenant against whom a final order of dispossess was made, had, in practical effect, no relief by appeal, because he was generally evicted before his cause could be heard and decided in the appellate court. To prevent this manifest injustice, chapter 943 was passed. As will be apparent from the perusal thereof, the interests of the landlord are most carefully protected pending such an appeal by requiring full security to be given by the tenant and the scrutiny of the case by the appellate tribunal or a justice of the Supreme Court of the State before the stay is allowed.

3. Chapter 944 amends chapter 136 of the laws of 1920 enacted in April, 1920. As amended, it repeats the finding of a serious housing emergency and crisis, first declared in the April laws, and provides that "by reason thereof, it shall be a defense to an action for rent . . that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive" (sec. 1).

Section 2 requires the landlord to file a bill of particulars setting forth material facts relevant to the issue of the reasonableness of the rent, and section 3 places upon the landlord the burden of proof upon this issue, if the rent sued for is greater than that of a year ago. In the April laws, the burden of proof rested upon the

tenant where the increase was not more than twenty-five per cent. over the rent of the year before (chap. 136). This had operated unjustly. It was found that the tenant almost never knew anything about the cost of the building, or the expense of operation, or other relevant facts, which were peculiarly within the landlord's knowledge; that the tenant could not, therefore, effectually resist an unjust increase of twenty-five per cent. in rent, and that, in consequence, the practical effect of the law, as it then stood, was to permit twenty-five per cent. to be added to the rent of a year before, no matter how large and unreasonable the rent might already be. Accordingly, the Legislature struck out the so-called twenty-five per cent. clause, and laid the burden of proving the truth upon the landlord, who knew the facts and thus could have no difficulty in making the truth appear. These considerations are explained in the official report of the Joint Legislative Committee (appendix, p. 159).

Section 4 expressly declares that—

> "Nothing herein contained shall prevent the plaintiff [i. e., the landlord] from pleading and proving in such action a fair and reasonable rent for the premises and recovering judgment therefor, or from instituting a separate action for the recovery thereof."

Section 5 further provides that if in an action for rent or rental value the landlord secures judgment by default, he shall, in addition to a money judgment, be awarded a warrant of dispossess, if payment be not promptly made, thus assuring to the landlord an efficacious and prompt remedy to recover possession. If he sues, for example, in the Municipal Court of the City of New York for unpaid rent, he can obtain judgment as promptly as he could heretofore have conducted a sum-

mary dispossess proceeding. This provision should be read in connection with chapter 945.

Section 6 provides that no tenant shall be entitled to litigate the reasonableness of the rent, or of the sum claimed for rental value, unless he has first deposited in court a sum equal to the last month's rent or the rent provided for in the lease; and here, too, it is provided that if the landlord recover more than the amount of the deposit, he shall have, not merely a money judgment, but a warrant of dispossess as well, if the excess recovered is not immediately paid in full.

Finally, section 8 provides that—

> "In case of an appeal by the defendant, the execution of the judgment and warrant shall not be stayed, unless the defendant shall deposit with the clerk of the court the amount of the judgment and thereafter monthly until the final determination of the appeal an amount equal to one month's rental computed on the basis of the judgment. The clerk shall forthwith pay to the plaintiff the amount or amounts so deposited."

4. Chapter 945 deals with summary dispossess proceedings for non-payment of rent. Such proceedings may be brought where "the rent . . . is no greater than the amount for which the tenant was liable for the month preceding the default for which the proceeding is brought," and in such a proceeding the reasonableness of the rent may be tested in substantially the same manner as in the action for rent which is regulated by chapter 944, considered above.

5. Chapter 946 amends the banking law so as to broaden the field of legal investments for public funds. It has no bearing upon the controversy at bar.

6. Chapter 947 suspends the action of ejectment in substantially the same manner as chapter 942 (discussed

above) suspends summary dispossess proceedings. Its purpose and effect are stated by the Joint Legislative Committee in its explanatory note (appendix, p. 164).

It must be manifest that it would have been a plain futility to prescribe that agreements for rent should not be oppressive nor for more than was just and reasonable, if at the same time the landlord were to be left free to evict at will. A tenant aware of the landlord's power to put him out of doors would in almost every case feel constrained to pay whatever was demanded. The threat of eviction—express or implied—would oppress and coerce him into submitting to extortion. The landlord would at once dispossess the tenant who resisted, and the latter in the existing shortage of housing would not be able to find a place to remove to. Aware of that fact, the vast majority of tenants would submit, and the act forbidding oppressive leases and unreasonable rentals would soon become a dead letter and a mockery in practical effect.

These obvious considerations made imperative the suspension of the remedies of ejectment and summary dispossess proceedings in hold-over cases. Without chapters 942 and 947, the provisions of chapter 944 would have been practically *brutum fulmen*. For a government to say to an individual that he does not have to pay an oppressive and unreasonable rental, but that he may be put out into the street with no new place to turn to, if he insists upon this legal right, "is the very irony of despotism. Apples of Sodom were fruit of joy in comparison" (Brewer, J., in *Chicago & N. W. Ry. Co. v. Dey*, 35 Fed. 866, 880).

7. Chapter 948 relates to Buffalo and Rochester only and need not be considered here.

8. Chapter 949 was intended to encourage new building. It empowers the local authorities to exempt from taxation until 1932 dwelling houses completed after April 1, 1920, those in course of construction and those hereafter built, if commenced before April 1, 1922, and completed within two years.

9. Chapter 950 remedies an obvious defect in the law by permitting a justice to vacate a final order in a summary dispossess proceeding, even though the warrant has issued, and to stay the execution of the warrant, where the order was made upon the default of the tenant and it is just to open the default.

10. Chapter 951 amends section 2040 of the Penal Law by making it a misdemeanor for a landlord or his agents wilfully to refuse to furnish hot or cold water, heat, light, power, elevator service, etc., covered by the lease. This law corrects chapter 151 passed in April, 1920, which was called forth by the innumerable complaints made by tenants to the Joint Legislative Committee and to the Board of Health in the City of New York that landlords, although demanding and receiving exorbitant rents, were, nevertheless, refusing to supply water and heat, to remove garbage, etc., even during the serious influenza epidemic of last winter. The reasons for the amendment were stated by the Joint Legislative Committee in its explanatory notes (appendix, p. 169).

11. Chapter 952 requires a precept in summary dispossess proceedings to "be returnable not less than five nor more than ten days after it is issued," instead of in not less than three nor more than five days, as it was heretofore. The character of the issues now triable in such proceedings and the large number of them made this change desirable and necessary.

12. The last of the series, chapter 953, relates to the jurisdiction of justices of the peace over summary dispossess proceedings in cities of the second class.

The foregoing summary shows that four of these laws are of paramount importance, namely, chapter 942 regulating hold-over summary dispossess proceedings, chapter 944 regulating actions for rent and rental value, chapter 945 regulating non-payment summary dispossess proceedings, and chapter 947 regulating ejectment. Together, these enactments constitute a complete and well co-ordinated statutory system whereby (1) oppressive evictions of tenants of dwelling house property in densely populated centres are prevented, whilst at the same time possession is permitted to be recovered by the landlord in all fair and reasonable cases, and (2) fair and reasonable rentals are secured and adequately safeguarded to both landlords and tenants of such property.

The prohibitions of the laws were not made applicable to buildings in course of construction nor to buildings hereafter to be erected. The nature of the emergency dictated this limitation. There were, of course, no tenants in such structures who feared eviction if they did not surrender to the landlord's demand for an extortionate rent; and, therefore, it was in every respect reasonable that buildings in course of erection and new buildings should be left unregulated. To exempt them tended also to promote their completion and the consequent relief of the housing shortage. Indeed, had the laws been made applicable to *new* buildings thereafter erected, the legislation would have been open to the charge that it was arbitrary because it would be preposterous to assume that unconstructed buildings without tenants called

for regulation protecting tenants against eviction and extortionate rents.

The statutes were likewise limited to dwelling house property in the largest cities and cities in counties adjoining such cities, because it was only in respect of such property that the crisis was acute and the need for relief keen. To have included office and business buildings might have been arbitrary, for there was no emergency in the City of New York in respect of such buildings. An office or a place of business does not compare in importance with a dwelling; and, therefore, the Legislature properly confined the new enactments to property *"occupied for dwelling purposes"* (*vide* chapters 942, 944, 945, 947 and 948) as the kind of property that at once and urgently required regulation, if the homes of citizens and the welfare and health of their occupants were to be protected, and the occupants saved from eviction, oppression and extortion. Similarly, it was only in densely populated centres and their vicinity that the evils of congestion and the dangers to the public health, safety and order were being seriously experienced, and, accordingly, the legislation was restricted to this field of operation alone where the evil to be remedied actually existed.

It is thus apparent that every phase of the statutory regulation embodied in these laws was reasonably appropriate, clearly directed to the crisis confronting the State, and carefully circumscribed so as to embrace only what was necessary and would tend to prevent injustice.

It will be noted that the court in the case at bar is concerned solely with a class of property owners who, in the course of their business of letting dwellings to others for hire, assert an absolute constitutional right to do what they please with their property so devoted to housing

and sheltering the public, and to evict notwithstanding circumstances of the keenest emergency and suffering and the highest demands of the public welfare; in other words, they set up an absolute property right (1) to extort all that they can coerce from helpless tenants, and to make a prey of their necessities, and (2) to evict at will, despite the facts that the tenants can find no other place to go to and that they are able and willing to pay the reasonable rental value of their homes.

The first question before the court is, therefore, as stated by Mr. Justice Laughlin in the case of *Levy Leasing Co.* v. *Siegel* at the Appellate Division (opinions, p. 135):

> "Whether, in the circumstances of the emergency, by which there was and would be until new houses and apartments were built this serious shortage of housing accommodations, the owners of existing houses, tenements and apartments which, in the City of New York, are occupied by far the greater part of the inhabitants as tenants, had a constitutional right to take advantage of their tenants and of others desiring accommodations and exact exorbitant rentals free from the exercise of any legislative regulation or control, or whether it was competent for the Legislature thus summoned in Extraordinary Session by the Executive, and fully advised with respect to these conditions, to apply this remedy to promote the general welfare and preserve the public health, safety and order, not by taking possession of private property either for public or private purposes but by limiting during the period of the emergency such owners who saw fit to lease their premises to the recovery of reasonable rentals."

The second question before the court is whether under such circumstances the owners of property so devoted to the business of renting to the public and thereby plainly affected with a distinct public interest by reason

of the emergency and the housing shortage, had an absolute constitutional right, on the one hand, to render homeless at will thousands of citizens and residents of the State of New York, or, on the other hand, to use this power of coercion for purposes of oppression and extortion.

In final analysis, there are two controlling inquiries in the case at bar: first, whether there existed in September last and still exists an emergency or crisis calling for remedial legislation, and hence whether the end in view was legitimate; and, secondly, whether the means adopted by the Legislature were reasonably appropriate and reasonably just to the landlords. The cardinal and controlling rule of constitutional law is, of course, that, if the end be legitimate all means which are not arbitrary and oppressive but reasonably appropriate and adapted to that end and not prohibited, are within the legislative power. The choice of the means is exclusively within the jurisdiction of the Legislature.

The existence of an emergency in the City of New York and the evidence of the shortage of housing accommodations and the danger to be apprehended from widespread evictions are discussed at length in points II and III with references to the official reports, such as the messages of the Governor to the Legislature, the reports of his Reconstruction Commission, the reports of the Joint Legislative Committee on Housing, the report of the Mayor's Committee on Rent Profiteering in the City of New York, and the bulletins of the Health Department of the City of New York. The effect properly to be accorded to such official reports is recognized and emphasized in the cases of *Wilson* v. *New*, 243 U. S. 332, 355; *McLean* v. *Arkansas*, 211 U. S. 539, 547-8; *People* v.

Charles Schweinler Press, 214 N. Y. 395, 402, and *Cockcroft* v. *Mitchell*, 187 App. Div. 189, 193.

In order to show that the means adopted by the Legislature are neither novel nor arbitrary, but appropriate and adapted to the legitimate end in view, examples from history and contemporaneous legislation in other countries have been adduced as strikingly illustrating what other civilized peoples throughout the whole world and in every age have deemed reasonably necessary and proper in the same or under analogous circumstances. This court has repeatedly referred to legislation of other times and countries in determining whether or not state legislation was reasonable or arbitrary. *Murray's Lessee* v. *Hoboken Land & Imp. Co.*, 18 How. 272, 276, and *Muller* v. *Oregon*, 208 U. S. 412, 419-20. Other peoples in all parts of the world have often been confronted with similar emergencies arising from a shortage of housing facilities, and the solution adopted by them has almost invariably been (1) to prevent eviction of the tenant in actual possession, and (2) to compel landlords to accept reasonable rents fixed by competent authority. Human experience so universal should be proof of the inherent reasonableness of the enactments now before the court, which, in final analysis, do no more than compel the acceptance of reasonable rentals fixed by competent authority and forbid oppressive evictions. To hold that these laws are arbitrary will be to convict the civilized governments of almost the whole world and of many ages of unreasonableness and oppression.

The persuasiveness of such a widespread consensus of opinion and practice was recognized by this court in *Muller* v. *Oregon*, 208 U. S. 412, 420, where, after commenting upon this aspect, Mr. Justice Brewer said:

> "Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated, and, debatable, and the extent to which a special constitutional limitation goes, is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration."

It is, therefore, submitted that, if the conclusion be reached that a housing emergency did, as matter of fact, exist in the City of New York in September, 1920, on the eve of the winter and in the face of the threatened eviction of nearly 100,000 families on October 1st, and that the means adopted were not arbitrary or oppressive, it must necessarily follow that the courts cannot set aside the legislation upon any idea that the problem should or might have been solved in some other way or by some different measures.

The only property rights of the landlord now temporarily suspended during a conceded public emergency are (1) his right to evict his tenant in actual possession, notwithstanding the willingness and ability of such tenant to pay a full and fair rent and the difficulty of securing other shelter for himself and his family if thus evicted, and (2) his right to extort what he will from helpless tenants. It should be emphasized and always borne distinctly in mind, as is shown in the foregoing analysis of the legislation in question, that the landlord is afforded an adequate and prompt remedy for possession of his property whenever the tenant fails to pay rent or the actual value of the use and occupation of the prem-

ises, if he allows the tenant to remain; that he is assured a just and reasonable rental, even if that be in excess of the rent payable prior to October 1, 1920, and that a new and extraordinary remedy has been created for the landlord's benefit in and by sections 5 and 6 of chapter 944, so as to entitle him to a warrant of dispossess if the money judgment awarded to him in a suit for rent or rental value should not be promptly paid.

The remedies that are suspended during the existing emergency or crisis, created by an unprecedented shortage of housing, are those of hold-over summary proceedings and ejectment on the expiration of the term of an existing lease and the refusal of the landlord to renew, only where the tenant is unobjectionable and is able and willing to pay a just and reasonable rent, determinable, if necessary, by the courts. The impelling and controlling purpose of the whole series of laws passed both in April and September, 1920, was to assure the continuance of existing shelter to present actual residents and citizens of the City of New York pending an unprecedented crisis and shortage, to protect them by enacting into law the custom or equity of renewal which respectable and unobjectionable tenants have always and reasonably relied on in the past, and to prevent landlords from evicting and rendering homeless and shelterless hundreds of thousands of men, women and children (present residents and citizens of the State, and as such peculiarly entitled to the protection of its government), in order that accommodation and shelter might be afforded to masses of strangers crowding into the city from other parts of the country and of the world and competing with its citizens for housing accommodations. One of the phenomena resulting from the World War has been

the crowding of the great cities, so that now, for the first time in our history, as disclosed by the census of 1920, a majority of the inhabitants of the United States are crowded together in the cities. We are no longer a rural or agricultural people, and we are facing most urgent and menacing problems flowing from overcrowding and involving, not only the feeding of fifty odd millions who are not food producers, but the housing and sheltering of abnormally congested crowds. This is particularly true of the City of New York with its 6,000,000 inhabitants, probably the most congested district in the world.

The courts are now urged by the landlords to hold that their property rights as landlords are so *absolute* and *overruling* that the Legislature is thereby rendered powerless to meet the indisputable emergency or to remedy the evil at all; that the Constitutions of the United States and of the State of New York alike operate to prevent any effectual remedial legislation to meet such a public crisis and menace, and that they render appropriate relief impossible, although now being afforded under all other civilized forms of government among nations suffering, as we are, from the effects of the World War. A holding of impotency on the part of American governments would, it is earnestly submitted, be a source of just reproach to our constitutional system and jurisprudence, and, if inevitable and sound, would disclose the seed of the ultimate undoing of our whole conception of limitations upon legislative power in the interest of the public welfare. Formalism and legalism, the letter which killeth in disregard of the spirit, could not be more blindly or dangerously pressed to a greater extreme.

But the rights of property, it is submitted, are not so absolute as to necessitate any such self-destructive and suicidal policy of government. On the contrary, as the courts have wisely and repeatedly recognized and emphatically declared, all property rights are exercisable subject to the ever-existing police power and *duty* of the State to legislate by fair and appropriate means to secure the protection, safety and general welfare of the community at large. In this instance, the community immediately affected and menaced is an unprecedentedly large one, crowded in a great city, which has more than double the population of the whole Republic when the Federal Constitution was adopted and more than the entire population of many of the nations of the world.

II.

THE ACTUAL EMERGENCY WHICH CONFRONTED THE LEGISLATURE.

On the 20th of September, 1920, the Governor called the Legislature into extraordinary session, because, as he stated in his message, he had become "convinced that an emergency confronts the State," and "that we cannot wait until the regular session to find remedies for its relief." Twenty-one months prior to this message (viz., in January, 1919), the Governor had appointed the Reconstruction Commission of the State of New York, and in his letter of instructions had called upon the Commission to "examine carefully the housing conditions of the State . . . to secure the fullest information, and after carefully studying it to recommend either legislative or executive action," and further referred to the fact that

"the war made apparent how fundamental adequate housing is in relation to labor supply."

The Commission so created by the Governor appointed a Housing Committee, consisting of John Alan Hamilton of Buffalo, as Chairman, Dr. Felix Adler, Peter J. Brady, Mrs. Lewis S. Chanler, Mrs. Wm. H. Good, V. Everit Macy, Alfred E. Marling, Mrs. Walter W. Steele, M. Samuel Stern and Arthur Williams. The Committee associated with itself an advisory committee in the City of New York, and another advisory committee for the up-state problems. The members of the New York City Committee included such well-known citizens as Walter Stabler of the Metropolitan Life Insurance Company, Walter Lindner and Clarence H. Kelsey, representing loaning institutions which finance housing construction; Robert D. Kohn, Fred Ackerman and Miss Marcia Mead, representing architects; Edgar A. Levy and Alexander M. Bing, representing builders; Allan Robinson, representing real estate interests; Lawson Purdy, former tax commissioner and manager of the Charity Organization Society, and John J. Murphy, former Tenement House Commissioner. This Housing Committee held hearings and conferences in New York City and also hearings in Buffalo, Syracuse, Rochester and Albany. On the 22nd of March, 1920, it reported officially to the Governor, among other things, as follows:

> "The Committee had hardly begun its study of the broad problems outlined in your message, when it was necessary for it to turn its attention to the solution of the housing emergency, apparent in March, 1919, but less acute than at this time, the symptoms of which were the distress caused by rent increases, the overcrowding of housing facilities and the resultant lowering of the standard of living throughout the State. The situation in

> New York City was particularly grave a year ago and is more so now. . . . If all the money available in the New York market and throughout the State were put forward tomorrow, it would be impossible to build even in a year, utilizing every bit of man-power or material available, houses enough to take care of the shortage." (Report of the Housing Committee of the Reconstruction Commission of the State of New York, dated March 22, 1920, pp. 2, 3.)

The committee certified that it based its report "on statistics compiled by the Tenement House Department as to the number of houses erected and destroyed each year," and estimated that the real present need of apartments in the City of New York was approximately 40,000. The committee further submitted comprehensive tables showing the number of tenement houses and the number of apartments completed in each borough of the City of New York during the years 1914 to 1919, inclusive, and thereby showed that whilst, for example, in 1915 there were 1,365 tenements erected containing 23,617 apartments, in 1919 only 89 tenements had been erected containing 1,481 apartments; in other words, they demonstrated a shrinkage of approximately ninety-four per cent. in tenement or apartment construction. The Housing Committee concluded its report as follows (*id.*, p. 8):

> "It is apparent from the above tables that the average number of apartments erected each year from 1914 to 1916 inclusive was 1,271 buildings, containing in all apartments for 21,517 families. If this same rate of building had continued there would have been erected during the years 1917, 1918 and 1919, 3,813 buildings, containing 64,551 apartments. As a matter of fact, however, during the years 1917 and 1918 only 890 tenements were erected containing 16,947 apartments. This meant that if during those two years the population continued to increase at a normal rate, there

would be a shortage of 1,652 buildings or 26,087 apartments. Early in 1919 it was apparent that there was a great scarcity of homes, and it was to be assumed that every effort would be made on the part of builders to meet this need. The fact is that there were completed in the year 1919 only 89 tenements containing 1,481 apartments to meet the normal demand for 21,517 individual apartments."

In making an estimate of the shortage, the committee emphasized that it was necessary to consider (1) continued increase of population, (2) vacancies that have been filled, and (3) houses that have been destroyed. With reference to the population of the City of New York the committee said (pp. 8-10):

"The war industries brought to New York a great many additional workers. An attempt was made by the neighboring cities to make use of the housing facilities of New York, and it was proposed that the Hudson tube be continued so as to bring the Newark shipyards in direct communication with the west side of New York. A careful survey that was made at this time showed that there was no available housing within walking distance of any of the Hudson tube stations in New York City. In spite of the practical cessation of immigration and the return of many of the citizens of our Allies to their native lands, the war industries have probably caused more than the usual yearly increase in population. . . .

"We know from a thorough survey that was made last year that in March, 1919, there were practically no unoccupied apartments that were fit for human habitation. . . .

"Each year a certain number of tenements, particularly of the older houses, are destroyed. In March, 1917, there were 972,810 apartments in the city, and between March, 1917, and March, 1919, 16,947 apartments were built. This would have made a total in March, 1919, of 989,757, but in reality, there were only 982,926 apartments in the city. Six thousand eight hundred and thirty-

one apartments had been destroyed. The figures show that in the year 1919 only 1,481 individual apartments were completed. In spite of this, 1,859 were destroyed, leaving us after a year of outcry for increased housing facilities with 378 less apartments than we had at the beginning of the year.

"The following brief summary shows, as far as possible from available statistics, the actual present need of new apartments:

Number of individual apartments needed 1917-1919 to house normal increase in population		43,034
Number of apartments erected, 1917-1919		16,977
Shortage of apartments, January, 1919, before allowing for vacancies, etc.		26,087
Vacancies filled during 1917 and 1918		14,153
Shortage after allowing for vacancies filled		11,934
Apartments destroyed, 1917 and 1918		6,831
Shortage of apartments January, 1919 after allowing for destruction and vacancies		18,765
Number of apartments necessary for estimated increase in population in the year 1919		21,517
Shortage of apartments without allowing for building during 1919		40,282
Number of apartments completed during the year 1919		1,481
Number of apartments destroyed in 1919		1,859
Real present need		40,660"

And the conditions resulting from the shortage in New York City were described as follows (pp. 10, 11):

"Raising of rents resulting from the shortage of houses has affected not only the poor, but a large part of the population even among the moderately well-to-do, have been forced into very congested quarters. Warehouses throughout the city are filled to overflowing with the furniture of fam-

> ilies that have been dispossessed. Owners of these household effects are sharing the limited quarters of friends or relatives. In many small apartments in the Bronx, in Brooklyn, in all parts of the city, are crowded two or more families. . . .
>
> "Before long, there will not be a chance for further doubling up in the overcrowded houses. A first sign that New York would not hold many more persons unless more houses were built was the opening of one of the armories to the dispossessed families that had nowhere else to go."

The Housing Committee further reported that—

> "families in all parts of the city were being forced into smaller and less satisfactory apartments. In turn, all classes were being driven by the pressure of rising rents and insufficient houses to a lower standard of living. Ultimately, those at the bottom would reach a point from which they could go no lower" (p. 15).

In order to ascertain what was happening in the cheaper forms of housing, the Housing Committee made a study of representative blocks in congested parts of the city, and from these it was able to report "actual conditions throughout the poorer districts of the city." These conditions disclosed that families were crowded together in dark, ill-smelling apartments, and were unable to find better quarters, that many landlords were taking no care of their apartments, that underpaid janitors neglected their duties, that in some cases, there were no janitors and the stairs were never cleaned excepting by the tenants, that in every block were ill-kept apartments, in fact, certain of them not being kept up at all, but allowed to fall into decay, that the roofs leaked, the plaster was falling off the walls and the stairs needed repair, that the water did not run, that the landlord refused to repaper or paint the dirty walls, that the rubbish was collecting in the basements, and yet that every apartment

was full and the tenants were afraid to complain to the landlord for fear he would dispossess them (p. 21). It was reported also as the conclusion of the committee after this investigation, that "an impartial interpretation of the facts disclosed by the survey forces the conclusion that a large part of the population is and has been housed in a manner detrimental to the health and safety of the community" (p. 22).

The facts reported to the Governor by the Housing Committee were confirmed by evidence taken on behalf of the Legislature itself by its Joint Legislative Committee on Housing appointed in April, 1919. This latter legislative committee in its preliminary report to the Legislature dated January 7th, stated in part as follows:

> "We are confronted by a condition so acute and indicative of such peril to the public welfare, that no mere theory, no matter how sound in normal times, must be permitted, even temporarily, to withstand the peril of necessity" (p. 8).
>
> "Facts and information have come to the committee, and to other bodies in touch with the situation, establishing that many landlords have taken unconscionable advantage of the shortage of available space for both dwellings and commercial purposes and have exacted exorbitant rentals. The most flagrant offenders are speculators who do not build and lessees of buildings who take over properties solely for the purpose of making excessive profits out of tenants willing to pay a reasonable rent, but who are compelled to pay extortionate rents, because they are unable to obtain other quarters.
>
> "Occupants of houses, in the face of these extraordinary demands, have in many cases had to take in roomers or share apartments with other families. . . . This condition is detrimental to the health, morals and business of the community. Such speculators and lessees have increased in the City of New York. They in no way benefit the market. The only thing they accomplish is a large

increase in rent and the oppression of innocent people. Thus social unrest is created, with all the consequent evils that follow.

"Specific cases have come to the attention of the committee where professional lessees, who speculate upon the distress of the defenseless, have taken over property occupied by tenants holding written leases. In order to get rid of the tenants and leases so that they may procure a larger rental, they have threatened and in some instances have cut off elevator service, light, heat, water and the use of the telephone" (pp. 9-10).

"We learn today tenants are told that they may remain for the stated period of one year or less at a specified rent, and in some cases the properties are thereafter sold or leased, as many as seven times a year, and the rents raised each time. The landlords and lessees of buildings are familiar with the law, but the tenants, especially in the congested neighborhoods, believe these verbal agreements to be valid, and only learn of their mistake when they are compelled to pay more than they agreed to pay or can afford to pay, and in most instances more than the quarters are worth, or when they are evicted as holdovers" (p. 11).

The Tenement House Commissioner of the City of New York made a survey of conditions in April, 1920, which included a visit to every apartment building in the city, and which showed the following vacancies in the entire city:

	New law apartments	*Old law apartments*	Total
Manhattan	231	2,883	3,114
Bronx	107	34	141
Brooklyn	100	177	277
Queens	...	....	....
Richmond	...	9	9

The percentage of vacancies was found to be as follows:

Manhattan	.58 of 1 per cent.
Bronx	.01 of 1 per cent.
Brooklyn	.01 of 1 per cent.
Queens	zero
Richmond	.57 of 1 per cent.

The "old law apartments" above referred to are those constructed before the New York tenement house laws went into effect. Of the 2,883 of those in the Borough of Manhattan, 2,452 had previously been abandoned as unfit to live in.

The Legislature thereupon passed by almost unanimous vote and the Governor approved the series of statutes enacted in April, which found and declared, in chapter 136, section 1, as follows:

> "Unjust, unreasonable and oppressive agreements for the payment of rent having been and being now exacted by landlords from tenants under stress of prevailing conditions whereby the freedom of contract has been impaired and congested housing conditions resulting therefrom have seriously affected and endangered the public welfare, health and morals in certain cities of the state, and a public emergency existing in the judgment of the legislature by reason thereof," etc.

The Joint Legislative Committee was continued, and it further studied the conditions existing throughout the State. It reported to the Legislature on September 20, 1920, after the April laws had been in force for nearly five months and had proved to be inadequate, as follows:

> "When the United States entered the World War it became necessary to immediately arrange for the production of colossal quantities of war essentials, and to organize all the economic and social forces of America for maximum effectiveness. Industries considered non-essential were restricted and building for other than governmental use at first hampered by freight embargoes, increased transportation rates, limited use of fuel, diversion of men, material and money was finally stopped when the War Industries Board prohibited the use of building materials for school houses, residences, apartments and hotels.
>
> "At the close of the war the Federal authorities reported a world-wide shortage of housing

accommodations and the need in America for one million new homes. The committee estimates the shortage of homes in New York State at this time to be approximately 100,000.

"The Federal, State and City Health Authorities direct the attention of the nation to the overcrowding, especially in the large cities, and point out that the housing situation presents a potential danger and menace to the public welfare. The old, abandoned, unsanitary tenements are necessarily occupied and the slum is again raising its head in the cities.

"The stability and progress of a people depend upon the comfort, healthfulness and security under which they live. Shelter is a necessity of life and the home the bulwark of the Nation.

"The housing shortage developed a practice of rent profiteering, national in its scope and consequences. Tenants were evicted by the thousands because they were unwilling or unable to pay a greatly increased rental. Rent riots occurred in a number of the cities. . . .

"It was not until the housing matter affected not only the very poor but the average citizen that the question has become one of great public interest.

"The unrest that is generated in the homes of a family which is harassed by high rents and undesirable change of domicile goes out into the community through the individuals so affected, so as seriously to menace the general welfare. . . . The most flagrant and the most acute form of extortion and one which is almost inescapable is rent profiteering. And as for eviction, never in the history of the City of New York have there been so many evictions." (Report of the Joint Legislative Committee on Housing, transmitted September 20, 1920, pp. 3-4, 5).

The report further showed that—

"Over 60,000 tenants have been notified to vacate on October 1, 1920, irrespective of the rental, and the President of the Board of Municipal Court Justices of the City of New York stated September 16, 1920, 'the summary or dispossess proceedings

against tenants during the month of October will exceed in number the record for the whole year 1919. If the hard-hit public is to be relieved action must be taken within a period of ten days after the Legislature convenes, otherwise our new May day, October first, will find us in a terrible condition. Our courts will be packed with frantic men and women. You will have to act quickly.'

"During the past year the calendars of the Municipal Courts of New York City have been so congested with rent cases that other business has been deferred. A court calendar of 300 or 400 cases a day is not unusual. Men, women and children wait for hours, frequently until late in the evening, for their cases to be called. Under these circumstances judges are able to give but a few minutes to the consideration of a case.

"The attempts of some landlords to obtain more rent by taking tenants to court month after month and the granting of short stays from time to time subject families to great anxiety. They know not when they may have to move, have no place to go, lose respect for the laws and the courts, who to them seem unable to protect their rights. They readily fall victims to the agitator . . .

"The inability to build during the war produced the shortage. . . . The demand for homes exceeded the supply and an active real estate market was developed, supported by few investors, but many rent speculators. Many who could not afford to pay were compelled to do so because, if evicted, they could not obtain other quarters. To meet the increases families took in boarders and doubled up. The 'leaster' appeared. He never 'sowed', rarely repaired, always 'reaped' by jacking up rent, and is largely responsible for the oppression practised" (p. 5-6).

In addition to the evidence submitted in the foregoing reports, the Legislature had before it the report of the Housing Conference Committee, appointed by the Mayor of the City of New York, dated July 21, 1920. This committee included on its executive committee the Mayor of the city and a number of well-known residents of the

city interested as builders, employers, manufacturers of building material, real estate operators, architects, transportation experts, etc. The report of the Mayor's committee stated that "each committee was made up of representative men whose ability and intimate knowledge of conditions in the branches of the building industry which they represent are well known, and whose opinions, therefore, constitute the best judgment that could be obtained upon the housing situation as it exists today." The reports of the sub-committees were "carefully correlated by the executive committee" and were "heartily concurred in by the committee of the whole." The conclusions were "based upon inquiries made and information received, and its report and recommendations hereinafter made are predicated upon this information and the reasonable inference to be drawn therefrom" (p. 3).

This committee reported the existence of a "famine of housing space", and declared that it would—

> "be manifestly more acute by October 1st than at present appears, when thousands of families will be returning to the City from quarters now temporarily occupied by them in the country and at seashore resorts (p. 5) . . .
>
> "Your Committee finds that the construction of homes is fully four years behind. Prior to 1914 approximately 28,000 homes were provided annually by the erection of new tenement houses alone. The tenement houses in course of construction at the present time will provide only 3,863 apartments. The one and two-family houses being erected will provide 8,405 more and 394 apartments are being constructed in apartment hotels. A total of 12,662 homes are therefore in the course of construction. Only 1,624 were provided by the tenement houses built last year, however; only 2,706 in 1918; and only 14,241 in 1917. To meet the normal demand a sufficient number of tenement

houses must be erected each year to provide at least 20,000 apartments. It is safe to say, therefore, that at least 100,000 apartments are now urgently needed, which number will apparently be increased in 1921 to at least 115,000 (p. 6).

"Your Committee reiterates that quick action is necessary and therefore recommends that the Governor be petitioned to call an extra session of the Legislature with as little delay as possible, for the purpose of enacting legislation that will relieve the conditions" (p. 8).

In an official bulletin issued by the Health Department of the City of New York, the following was stated:

"Respiratory and contagious diseases in infancy and early childhood are largely the result of close and indiscriminate contact, and the present housing situation, which has necessitated not only the doubling up of families, but the housing of large families in a smaller number of rooms than was the case in pre-war times has afforded that close contact and inability to properly isolate, which make for the spread of these diseases. It is our impression, that not only has the incidence of those diseases been increased, but that the greater mortality is largely due to the fact that, because of such close contact, the dosage of infection (if we may use that term) has been larger and, as a consequence, the virulence of the diseases greater. It is a universal experience that infants and young children are most sensitive to unfavorable environment, and are the first to suffer when such conditions arise, and, it is thus seen that the housing situation bears a distinct realtionship, not only to the health and well-being, comfort and happiness of the adult population, but also to the health and lives of infants and young children." (Health Dept. Bulletin, new series, vol. IX, No. 42.)

The Housing Committee of the Merchants' Association of the City of New York reported in July, 1920 (see "Greater New York", bulletin of the Merchants' Association, July 21, 1920), that—

> "The housing shortage is nation-wide, if not world-wide, and seriously threatens the industrial efficiency, peace and prosperity of this country and the health and contentment of its people. . . .
>
> "The situation is complicated by the efforts at real profiteering on the part of a few landlords."

And the Real Estate Board of New York in a series of "Recommendations on Legislation to Relieve the Housing Shortage" submitted to the Governor and the Joint Legislative Committee on Housing, after adverting to the "existing shortage of housing facilities," declared that—

> "Under any circumstances, no adequate supply of new housing can be provided for a year or two."

Th Governor in his message to the extraordinary session of the Legislature (September 20, 1920), referred to the problems pressing for solution as the direct result of war conditions, and declared that "none of them has so taxed the agencies of government as the question of proper housing facilities." He stated that in January of 1919 he had charged the Reconstruction Commission "with the duty of making an exhaustive inquiry into this subject to the end that the legislative and executive branches of the government might be in a position to deal with this problem, which even at that time promised to be acute," and he referred to the fact that both houses of the Legislature, "believing that facts should be produced upon which to predicate remedial legislation, appointed a committee from both houses of the Legislature to investigate the subject," being the "Joint Legislative Committee on Housing" above referred to and in whose behalf this brief is submitted. In this special message the Governor further said:

> "Our temporary laws of last spring have fallen short of what was expected of them and selfish-

ness and greed on the part of not a few landlords has brought about an indescribable condition in the Municipal Courts in New York City. I am informed by the President of the Board of Justices of the Municipal Court that there are pending for October first more notices of dispossess proceedings than were filed during the whole year 1919—approximately 100,000. The court rooms have been crowded beyond their capacity by tenants seeking relief. These figures of themselves cannot communicate the harassing uncertainty and the misery caused by the constant repetition of these proceedings. It has been publicly stated by the Health Commissioner of the City of New York that this condition of uncertainty is alone a direct menace to the health and welfare of the community. The housing shortage leaves the citizen nowhere to turn. Families have been broken up and dispersed generally through the city, or crowded and huddled into the homes of relatives until the health, welfare and morality of the community is seriously threatened. . . .

"The people, to some degree at least, have managed to protect themselves from other forms of profiteering, but they are helpless to deal with this one, because a home everyone must have. . . .

"There is an abundance of evidence that undesirability or failure to pay rent is not in the majority of instances the basis of the application for the writ of summary removal, but on the other hand, it is the operation of the profiteer who would remove the desirable and paying tenant in order to create a vacancy which may thereafter be offered to the highest bidder. As a result of this, families have been shifted from place to place without rhyme or reason and the unscrupulous and selfish have profited immensely by it. October first was to be the height of the harvest. The State should step in and use its power to disappoint them.

"If the present condition be not thus relieved and the health of the community continues to be menaced, then we have a grave public emergency to meet such as would confront us in a time of epidemic or of catastrophe. . . .

> "I believe the emergency to be such that the strong arm of the State must reach through its courts and protect the people for at least one year, until the crisis shall have passed or the situation is relieved."

The conclusions of the Governor of the State and of the Legislature were not hastily arrived at; but were based upon exceptionally careful and painstaking study covering months of investigation and public hearings. It would be impossible, within the scope of this brief, even to summarize adequately the testimony submitted to the Joint Legislative Committee. Case after case was presented to them showing great hardship and oppression in rents of dwellings; and case after case was presented to them showing that innumerable families were in danger of being turned into the street and rendered shelterless on October 1st, if relief were not granted.

The legislative declaration that an emergency existed was, therefore, abundantly supported by the facts, and it was such a grave emergency as to call for a special session of the Legislature.

Indeed, perhaps no legislation was ever passed by the Legislature of the State of New York which was the subject of more thorough and exhaustive investigation, and the reports above referred to are, therefore, entitled to even greater weight than is usually accorded such official findings and documents. *Wilson* v. *New*, 243 U. S. 332, 335; *McLean* v. *Arkansas*, 211 U. S. 539, 547-8; *People* v. *Charles Schweinler Press*, 214 N. Y. 395, 402; *Cockroft* v. *Mitchell*, 187 App. Div. 189, 193.

III.

THE TWO-YEAR PERIOD OF SUSPENSION WAS REASONABLE AND NOT ARBITRARY.

The question before the New York Legislature was, not only whether there was an emergency, but how long it would probably last. It was indispensable to determine that aspect in order to deal adequately and appropriately with the situation, or else arbitrarily enact a *permanent* rule. Forecast lay at the threshold as it so often does with all forms of legislation. The acute crisis and housing shortage were certain to endure a substantial period. That was inherent in the very nature of things, since it requires the greater part of a year to erect the ordinary tenement or apartment house, and thousands of them were imperatively needed. On March 22, 1920, the Housing Committee of the Reconstruction Commission had reported to the Governor that (p. 3)—

> "If all the money available in the New York market and throughout the State were put forward tomorrow, it would be impossible to build even in a year, utilizing every bit of man-power or material available, houses enough to take care of the shortage."

The Real Estate Board of New York had declared in its report to the Legislature above quoted that—

> "Under any circumstances, no adequate supply of new housing can be provided for a year or two."

The Joint Legislative Committee in September, 1920, reported that (pp. 3-4)—

> "The committee estimates the shortage of homes in New York State at this time to be approximately 100,000."

And in a prior report made by the Housing Committee of the Governor's Reconstruction Commission (March 26, 1920) it had been pointed out, after a careful study of statistics and other information, which it is unnecessary to reproduce here, that normally about 21,000 apartments or homes were needed and built each year (p. 8). The Mayor's Committee in July, 1920, reported (p. 6) that—

> "Your Committee finds that the construction of homes is fully four years behind."

The Governor certified to the Legislature in his message of September 20, 1920, that "the State is years behind its normal housing accommodations", that "in New York City *at least* 50,000 homes are immediately necessary", and that "the State must reach through its courts and protect the people *at least* one year, until the crisis shall have passed or the situation is relieved" (pp. 3, 4).

After due consideration of all the facts, the Legislature fixed until November 1, 1922, as the probable period during which the emergency must continue and during which, therefore, the ordinary remedies to recover the possession of real property should be suspended. It solemnly declared its judgment upon the necessities of the situation, and quite prudently and conservatively, too, in view of the proofs before it. As this court well said in *Rast* v. *Van Deman & Lewis*, 240 U. S. 342, 357:

> "It makes no difference that the facts [upon which the Legislature acted] may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety".

Since the decision by the Legislature as to the probable continuance of the crisis was reasonably necessary to the due discharge of its legislative functions, it ought to be most persuasive with, if not binding upon, the

courts. *Hebe Co. v. Shaw*, 248 U. S. 297, 303; *Price v. Illinois*, 238 U. S. 446, 452; *Matter of Stubbe v. Adamson*, 220 N. Y. 459, 469-70.

Certainly, it ought not to be set aside so long as the emergency to which the legislative action was addressed, actually continues. Despite some denials from highly interested sources, the housing shortage still continues, not only in New York, but throughout the United States generally. In an official report submitted to the Senate of the United States on December 14, 1920, it is stated that "the total housing construction during the last four years is hardly equal to that of a normal year" (p. 1), and it is earnestly urged upon the Congress to take important measures at once to relieve the situation.

On December 4, 1920, Dr. Copeland, the Health Commissioner of the City of New York, sent Senator Calder of the United States Senate Reconstruction Committee a report on existing conditions, which is too long to be quoted here, but which is printed in full in the appendix to this brief. This report was made on behalf of the health commissioners of the country from cities of 200,000 or more, and it sets forth facts showing an extraordinary shortage of housing and a serious crisis as a result thereof.

On the same day, December 4, 1920, Dr. Copeland also published his summary of the results of two extensive surveys of housing conditions in the City of New York, one made in March, 1920, and the other in November, 1920. It reads as follows:

> "The Department of Health in order to determine exactly the conditions in relation to the alleged shortage of houses for dwelling purposes in this City conducted two surveys of selected sections of the Boroughs of Manhattan, Bronx and

Brooklyn. One of these took place in March and the other survey in November of 1920.

"The following charts show comparatively some of the compilations made from the voluminous data obtained:

Number of houses investigated

Borough	*March*	*November*
Manhattan	12,170	19,209
Bronx	9,718	15,895
Brooklyn	10,582	25,385
Total	32,470	60,489

Number of lodgers present in these houses

Borough	*March*	*November*
Manhattan	18,638	43,483
Bronx	8,571	18,221
Brooklyn	4,407	8,285
Total	31,616	69,989

Number of houses overcrowded

Borough	*March*	*November*
Manhattan	3,244	7,454
Bronx	1,837	5,590
Brooklyn	1,195	2,961
Total	6,276	16,005

Percentage of houses overcrowded

Borough	*March*	*November*
Manhattan	26.6	38.8
Bronx	18.9	35.1
Brooklyn	11.2	11.6
City	19.3	26.4

"In order to offset the criticism that the better class section of Manhattan and Brooklyn were not surveyed in March, it was thought proper to include in the November survey the following portions of those boroughs, which would meet the criticism:

Borough of Manhattan: 86th Street to 110th Street from Central Park West to the Hudson River;

Borough of Brooklyn: The Park Slope area.

"As an evidence of the shortage of apartments may be mentioned the fact that in the areas surveyed there were the following vacancies:

Borough of Manhattan	596
Borough of The Bronx	193
Borough of Brooklyn	196

"A considerable number of these vacancies are due to the uninhabitable condition of the premises in question, and in other instances the rentals range from $720 to $6,000 a year—beyond the reach of our ordinary citizen.

"The increase in the shortage in the Borough of Manhattan, seems to be due, to some extent, to the demolition in tenement and dwelling houses. Garages, theatres and warehouses have replaced these.

"This survey has revealed a number of instances where each apartment on a floor has been subdivided and small kitchenettes installed. These kitchenettes are unsatisfactory when installed in a corner of a bedroom, living room or passageway, but are abominable when placed in watercloset apartments as found in some cases.

"It is evident from morbidity and mortality statistics in cities that the sections most seriously overcrowded show the highest infant death rate. Tuberculosis and other diseases of the respiratory tract are present in these overcrowded sections in greater proportion. The lack of privacy, the insanitary, strained and unusual conditions create an excellent field for the spread of venereal diseases, and tend to result in moral and mental degeneracy."

In view of the foregoing facts, it cannot be reasonably doubted that a shortage of housing facilities still exists and it can hardly be seriously suggested that the Legislature was acting arbitrarily in fixing November 1,

1922, as the probable duration of the emergency or crisis in the City of New York. Indeed, longer periods have been adopted in some jurisdictions. Thus, for example, the Wisconsin Legislature fixed the period until April 30, 1923, that is to say, six months longer than the New York Legislature (sec. 1, ch. 16, laws of special session of 1920).

It should be borne in mind, moreover, that no prejudice can befall any one if the Legislature should ultimately turn out to be wrong in this forecast; for, if the prediction does not square with the facts as they develop in the future, the courts can grant relief, even if the Legislature should neglect to do so. It is settled that "a law may be within the pale of constitutional authority when originally passed, yet because of its future operations it may directly contravene the organic law." *Castle* v. *Mason*, 91 Oh. St. 296, 302. See also *Sullivan* v. *City of Shreveport*, 251 U. S. 169, 171; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *id.* 146, 162; *Johnson* v. *Gearlds*, 234 U. S. 422, 446; *Perrin* v. *United States*, 232 U. S. 478, 486. That was the basis of the opinion of Judge Cardozo speaking for the New York Court of Appeals in the exceptionally well-considered case of *Municipal Gas Co.* v. *Public Service Comm.*, 225 N. Y. 89, 95-97, where it was pointed out that circumstances arising long after the passage of an act may affect and determine its continuance in force and effect and its present constitutionality, and may render the prediction "worthless" and as such to be cast aside. If, therefore, it should hereafter and before November 1, 1922, come to pass that the housing shortage and emergency in the City of New York disappear, the courts will then have ample power to declare these laws to be no longer

in operation. It may not now, however, be presumed that when that time comes, the Legislature will not itself repeal these laws. No such presumption of legislative neglect or failure may be indulged.

Consequently, it is both academic and useless to consider now—when the shortage and the emergency are both still acute—whether the Legislature was right in fixing the period until November 1, 1922, for the continuance in force of the statutes in question. In view of the facts before it, certainly it was not acting arbitrarily in this regard when it fixed that period; and in view of the serious situation still prevailing, its decision of this issue may not at this time be deemed arbitrary or oppressive. It is, therefore, submitted that the enactments in question cannot and should not be interfered with on this ground.

IV.

ANALOGOUS CONDITIONS IN OTHER COUNTRIES.

In determining the constitutionality of statutes passed in the exercise of the police power, the courts have invariably attached much weight to examples of analogous legislation in other countries enacted in order to remedy similar acute conditions or to meet similar governmental problems. *Muller* v. *Oregon*, 208 U. S. 412, 419-20; *People* v. *Charles Schweinler Press*, 214 N. Y. 395, 403. The conditions in New York City were the same as those which existed in all congested centres throughout the world as a result of the World War. Like causes had produced like effects.

The General Assembly of Newfoundland on June 5, 1919 (chapter 10), passed the Tenants' Act, which recited as follows:

> "WHEREAS there is at present a scarcity of dwelling houses in the town of St. John's;
>
> "AND WHEREAS much inconvenience and distress is occasioned thereby,
>
> "AND WHEREAS rentals by reason of such scarcity have been increased in many instances to an excessive and an exorbitant degree,"

and provided that as to dwelling houses within the municipal limits of St. John's, an increase of rental, *if unfair*, should not be recoverable, "nothwithstanding any agreement to the contrary," and that—

> "No order or judgment for the recovery of possession of a dwelling-house, to which this Act applies, or for the ejectment of a tenant therefrom shall be made or entered so long as the tenant continues to pay rent at the rate agreed at the time of the coming into force of this Act; and performs the other conditions of the tenancy"

unless he (a) commits waste, or (b) is a nuisance or annoyance to neighboring occupiers, or (c) the premises are reasonably required by the landlord for the occupation of himself or some member of his family, or (d) the house is sold to a *bona fide* purchaser intending to dwell therein, or (e) for some other good ground which may be deemed just or reasonable by the court making such order. An *unfair increase* was defined by the act to be such an amount as the judge of the Central District Court shall deem unfair upon an application made to him by the tenant, and he was empowered to fix what was a fair and reasonable increase in his judgment.

The Parliament of New South Wales, in the act of December 29, 1915, George V, c. 66, created a "Fair Rents Court", gave authority to this court to determine the rent, and provided that what it so determined should be the rent. Any covenant or agreement purporting to waive the tenant's rights was to be null and void, but

"where circumstances [which] render an increase equitable are proved to the satisfaction of the court, the fair rent shall not exceed the rent at which the dwelling was let on the first day of January, 1915." Severe penalties were provided for charging more than this fair rent, and for any threats or efforts to dissuade or prevent the lessee from making an application to the court under the act.

The New Zealand statute of 1918 (act of 10 Geo. V, 1919, No. 32, p. 104) extended the War Legislation Act, which protected tenants in a specified class of rentals against eviction if the landlord was paid at the agreed rate, unless the tenant was guilty of waste, or was a nuisance, or the landlord required the premises for his own occupation, "or any other ground that may be sufficient to the court making the order." The court, however, is not required to make the order if the making thereof "would cause undue hardship to the tenant".

The 1919 report (No. 12, pp. 45-6) of the Interstate Commission of Australia to the Parliament of Australia on the subject of rents stated as follows:

> "In all countries the housing of the people under reasonable conditions of comfort and environment is no new problem," but "the practical cessation of building construction during the war has accentuated the trouble, and in most oelligerent countries it is realized that the gravity of the situation demands immediate decision and remedy. Australia is no exception. . . .
>
> "But any hardship due to increased rentals becomes dwarfed in comparison with the mischief, which overwhelming testimony shows to be acute, arising from the actual deficiency in the number of houses necessary for the community, and which has caused a notable increase in overcrowding, coupled with the existence and enforced occupation of a mass of dwellings in our cities which fall short

> of the meanest standards of health and comfort and which constitute a serious social menace."

In South Africa the recent act of June 21, 1920, created Rent Boards throughout the country, as many as might be necessary. These boards were vested with power to reduce rents in cases of dwelling houses, and section 11 of the act provided that—

> "No order for the recovery of possession of a dwelling or for the ejectment of a lessee therefrom based on the fact of the lease having expired either by effluxion of time or in consequence of notice duly given shall be made by any court so long as the lessee continues to duly pay, in respect of the dwelling, a reasonable rent therefor and performs the other conditions of the tenancy,"

except on the additional ground (a) that the lessee was damaging the property, or (b) that the Rent Board found that the tenant was a nuisance to adjoining tenants or neighbors, or (c) that the premises were reasonably required by the lessor for his own occupancy. The reasonable return to the landlord was not to be more than 10 per cent. on the actual cost of erection, and 6 per cent. on the actual cost to the owner erecting the dwelling, of the land on which it was situated and which was occupied in connection with it.

The report of the Committee of Great Britain on the Increase of Rent and Mortgage Interest Act, made in 1919, tells the same story. It showed that the shortage of houses having become acute in England, "the situation thus created lent itself to the raising of rents and ultimately to the exaction of scarcity or monopoly rents" (p. 4).

In Holland, the official report on the shortage of housing accommodations of a housing congress meeting last

year (The Economic Review, May 26, 1920, p. 60) set forth that—

> "The house shortage is very acute in Holland. As far back as 1913 the increase of new houses was inadequate for the increased population. During the war private building enterprise entirely stopped, with the result that housing accommodations became very restricted and rents rose phenomenally."

In Norway it appeared that "such is the scarcity of accommodation . . . that people are urgently requested to let any rooms which can possibly be spared, since it will otherwise be necessary to proceed to compulsory expropriation" (*id.*, May 12, 1920, p. 5).

In France, there is legislation extending the terms of leases under the Extension Law promulgated on March 9, 1918. In the report of the French legislative committee, it is stated, as quoted in The Economic Review of September 3, 1920, p. 385, that "in order to guard against the social danger which the lack of available dwellings in the important localities would cause, it is necessary to prevent as far as possible the simultaneous expiry of extensions and of leases. To this end, the bill aims at establishing a temporary system applicable to dwelling-houses." The bill referred to provides that during a maximum period of three years the landlord may not refuse to keep on the tenant who will engage to pay him the rent provided for in the bill. Rents are calculated on the basis of the ratable values of 1914. They rise in stages, in accordance with the length of the extra term. If the increases do not insure the landlord an income of six per cent. on the capital represented by the property, the landlord may be empowered by the magistrate to demand a rent to insure him this income. Rents fixed by previous agreements and which exceed

the statutory rates must be adjusted to them as of right on the demand for an extension. Any charge exceeding the fixed limits is punishable as illicit speculation in rents. The law is limited in its application to the *Seine et Oise Communes* within a radius of twenty-five kilometers from the Paris fortifications and applies to places with at least 20,000 inhabitants. The landlord may cause the eviction of his tenant only for one of three reasons, viz.: (a) if he wants the dwelling for himself or his family, (b) if the tenant does not pay the rent fixed by law, and (c) if the tenant is undesirable or a nuisance to his neighbors.

In Spain by a royal decree passed June 21, 1920, (The Economic Review, July 9, 1920, p. 205), leases in towns of over 20,000 inhabitants are extended without alteration of rent, except as provided under the decree. Landlords are not permitted to exercise the right of eviction except in cases of non-payment of rent, and the increases of rent permitted are as follows: If on December 31, 1914, the annual rent did not exceed 1500 pesos,* it may be raised ten per cent. If it exceeded 1600 pesos on that date but did not reach 3000, it may be raised fifteen per cent. If it exceeded 3000, the increase may be twenty per cent. By article 10, agreements in conflict with the act are made inoperative, and by article 11 cases of eviction are triable by a court composed of a municipal judge, assisted by two landlords and two tenants.

In Germany there are compulsory housing laws exceeding in severity anything attempted in this country, and which apply even to furnished rooms (The Economic Review, June 16, 1920, p. 137), and similarly in Hungary

* *Peso* is a Spanish or a Mexican dollar, worth ordinarily about fifty cents in our money.

(May 26, 1920, p. 60). The shortage in Sweden is so great that the government contemplates erecting buildings to provide nine thousand rooms within the next five years (p. 61). In Belgium it is now a penal offense to increase rent beyond thirty per cent. "People who have been forced to pay unreasonable rents will be able to have them revised. Premises to let must show the amount of rent asked on the 'To Let' boards, so as to prevent speculation," and "in the new proposals provision is to be made for expropriation of empty premises" (May 12, 1920, p. 5).

The recent English acts are discussed below at pp. 92 to 94. They may for the present be briefly described as having a two-fold purpose, namely, (1) to forbid unreasonable rents and (2) to prohibit cruel and oppressive evictions (5 and 6 Geo. V, ch. 97, 1915).

See also for a more extensive discussion of the subject throughout the world an article on "Regulation of Rentals during the War Period" by Edward L. Schaub, January, 1920, vol. XXVIII, No. 1, Journal of Political Economy, and an article on "Rent Regulation and Housing Problems" by Walter F. Dodd and Carl H. Zeiss, January, 1921, Journal of the American Bar Association, p. 5.

V.

NEITHER THE CONTRACT CLAUSE NOR THE DUE PROCESS CLAUSE OF THE CONSTITUTION ABRIDGES THE POWER OR DUTY OF THE LEGISLATURE TO ENACT APPROPRIATE AND NECESSARY LAWS IN ORDER TO PROTECT AND SAFEGUARD THE HEALTH, SAFETY, ORDER, MORALS, OR GENERAL WELFARE OF THE PUBLIC.

Little or no regulation of persons or property by the legislative branch of the state government would be pos-

sible without some impairment of and interference with personal or property rights. Even the most commonplace regulations and prohibitions inevitably interfere with or restrain somebody in his liberty or property. But that is the unavoidable concomitant of social life and government and, if reasonable, may not be complained of. This is but ordered liberty in civilized social communities. Neither property nor personal rights would have any existence more certain and respected than the strength of their temporary possessor, if it were not for the realization of and profound belief in this social principle of mutual concessions of liberty and property which well-organized communities cherish and maintain. Such reasonable requirements as are found to be necessary in the public interest, therefore, underlie and qualify every individual right. *Hadacheck* v. *Los Angeles*, 239 U. S. 394, 409-10; *People ex rel. Nechamcus* v. *Warden*, 144 N. Y. 529, 535. No private property right can be above them, for the very right and protection of private property itself depend upon their existence; and no private contract can supersede or fetter them, for the very obligation of such a contract draws its vivifying force from the sanctions and protections accorded by government in the public interest.

These elementary considerations are adverted to only because it is necessary to bear them in mind in weighing the force to be accorded to the persistent, but unsound, claim of *absolute* property or contract rights in private persons above and beyond the necessities of government and the demands of the public welfare. In the *Legal Tender Cases*, 12 Wall. 457, 551, decided as early as 1870, Mr. Justice Strong defined private rights under our system of constitutional government as follows:

> "As in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority."

This doctrine has been repeated many times since, and legislation has been frequently upheld by the courts, although it materially interfered with property and prior contract rights. *Producers Transp. Co.* v. *R. R. Com.*, 251 U. S. 228, 232; *Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U. S. 372, 375-7; *Texas & N. O. R. R. Co.* v. *Miller*, 221 U. S. 408, 414; *Louisville & N. R. R. Co.* v. *Mottley*, 219 U. S. 467, 482; *Manigault* v. *Springs*, 199 U. S. 473, 480; *Chicago, &c., R. R. Co.* v. *Nebraska*, 170 U. S. 57, 72-4; *Douglas* v. *Kentucky*, 168 U. S. 488, 497; *People ex rel. City of New York* v. *Nixon*, 229 N. Y. 356, 359; *Lincoln Trust Co.* v. *Williams Bldg. Corp.*, 229 N. Y. 313, 317; *People ex rel. Vil. of Glens Falls* v. *P. S. C.*, 225 N. Y. 216, 223; *Anderson* v. *Steinway & Sons*, 178 App. Div. 507, 516, affirmed 221 N. Y. 639; *People ex rel. Publicity Leasing Co.* v. *Ludwig*, 172 App. Div. 71, 74, affirmed 218 N. Y. 540; *B. E. S. R. R. Co.* v. *B. S. R. R. Co.*, 111 N. Y. 132, 140; *Van Rensselaer* v. *Snyder*, 13 N. Y. 299, 303; *Boret* v. *Vogelstein & Co., Inc.*, 188 App. Div. 605, 612; *City of New York* v. *Herdje*, 68 App. Div. 370, 373-4; *Knenzli* v. *Stone*, 112 Misc. 125, 130; *Salem* v. *Maynes*, 123 Mass. 372, 374; *Corporation of Knoxville* v. *Bird*, 12 Lea (Tenn.) 12; 12 Corpus Juris, pp. 991-3.

Thus, in *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, the plaintiff, who had sustained an injury upon the defendant's line of railroad, entered into an agreement with the defendant that, as part consideration of his releasing it from liability, he should be entitled to

free transportation for life. In 1871, when this contract was made, it was in all respects valid and binding. Indeed, it was not until 1887 that the first of the important interstate commerce acts was passed, and it was not until 1906 that a carrier was prohibited from carrying passengers for any other consideration than cash. It was, accordingly, argued that the plaintiff's contract could not validly be impaired by this subsequent legislation and that so to impair or destroy it would be in effect to take the plaintiff's property without due process of law. But the court emphatically ruled to the contrary, saying (pp. 482, 485-486):

> "The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist. . . . In *Kentucky & Indiana Bridge Company* v. *Louisville & Nashville Railroad Co.*, 34 Am. & Eng. R. Cases, 630, Judge Cooley said:
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> "'But the act to regulate commerce is a general law, and contracts are always liable to be more or less affected by general laws, even when in no way referred to. . . . But this incidental effect of the general law is not understood to make it a law impairing the obligation of contracts. It is a necessary effect of any considerable change in the public laws. If the legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable.' . . .

> "We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived."

Nor does it in any way effect the force of this decision to insist that the prohibition against impairing the obligation of contracts is directed against the States alone; for it is too plain to require supporting argument that any law which substantially impairs the obligation of a contract also takes property, since it reduces the value of the contract; and if such impairment were improper, it would violate the Fifth Amendment when done by a federal authority. That has, indeed, been the construction placed upon the *Mottley* case by this court itself in subsequent cases. *E. g., Producers Transp. Co.* v. *R. R. Comm.*, 251 U. S. 228, 232.

In the recent case of *Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U. S. 372, 375, the subject was again carefully reviewed and this court held as follows:

> "It will be seen that the case of the plaintiff in error is narrowed to the claim that reasonable rates, fixed by a State in an appropriate exercise of its police power, are invalid for the reason that if given effect they will supersede the rates designated in the private contract between the parties to the suit entered into prior to the making of the order by the Railroad Commission.

"Except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion.

"That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court. Thus in *Manigault v. Springs*, 199 U. S. 473, 480, it was declared that:

"'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from properly exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected.' . . .

"In *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, 482, this is quoted with approval from *Knox v. Lee*, 12 Wall. 457, 550, 551, viz.:

"'Contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of a contract can extend to defeat the legitimate government authority.' . . .

"In *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 558, the court said:

"'It is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.' . . .

"These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the State."

Accordingly, laws which forbade the erection of certain types of buildings, which prohibited certain kinds of businesses, which fixed certain prices, which abolished certain valuable remedies, like distress, etc., have all been uniformly upheld as valid exercises of the police power notwithstanding the fact that they seriously impaired or wholly wiped out pre-existing private contracts of large value providing to the contrary. The only inquiry pursued by the courts in these many cases has been whether the statute in question was a proper exercise of the power of government, that is, whether in any aspect it could be regarded as passed in the public interest and as reasonably calculated to subserve that interest, due allowance being made for the broad discretion vested in the legislative body in these respects, and whether the means were reasonably appropriate and adapted to a legitimate end. If it was a proper exercise of the police power or the power of government, the fact that it more or less, or even wholly, interfered with, and in that sense impaired, contract obligations theretofore entered into, was regarded as immaterial.

The slightest reflection, it is submitted, must disclose the soundness of this conclusion. If it were possible for individuals to estop due and proper exercises of governmental power and duty by private contracts among themselves, private agreements could impair the legislative power in practically all classes of cases. It would then be possible for irresponsible individuals by private transactions between themselves in practical effect to deprive the duly chosen agents of the people of a large part of the power and duty to govern. Indeed, if the constitutional prohibition against impairing the obligation of contract were not subordinate to the due exercise of the

police power, the power of government which would rightfully belong to the people and their accredited and responsible representatives in legislative bodies would only consist of that small and ever-diminishing field which private contract and individual self-interest saw fit to leave unfettered for the moment. In other words, government would prevail only at the sufferance of private contract. No such theory can possibly be sound or tenable directly or indirectly.

Nor is the question to be decided in the case at bar put upon any different basis by urging that the statutes in suit interfere with the liberty of contract as distinguished from the impairment of contract. That right is and may also be qualified and limited in the public interest, and for reasons entirely similar to those referred to. *Chicago, B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549, 567; *McLean* v. *Arkansas*, 211 U. S. 539, 545; *Rail & River Coal Co.* v. *Ohio Industrial Com.*, 236 U. S. 338, 349. As stated in *Chicago, B. & Q. R. R. Co.* v. *McGuire, supra:*

> "There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

And in *Rail & River Coal Co.* v. *Ohio Industrial Com.*, 236 U. S. 338, 349, the state of the law upon this subject was aptly described as follows:

> "This court has so often affirmed the right of the State in the exercise of its police power to place reasonable restraints like that here involved,

upon the freedom of contract that we need only refer to some of the cases in passing."

Quite plainly, if it were not permissible to the legislative branch of the government to interfere with the liberty of contract, it would be difficult to conceive of a subject matter upon which it could unrestrainedly legislate, for it is patent that every such subject-matter might under some circumstances be made the subject of private contract. So that in this aspect of the case as well, the inquiry must be only whether the enactments in suit are reasonable exercises of the police power. If they are, then it is immaterial how much or how little they restrain individual liberty of contract.

Equally immaterial is it that the statutes interfere with property rights. That, too, may be lawfully done by the Legislature in the reasonable exercise of its police power. It constitutes but a taking by due process of law if it be really a taking at all. *Hadacheck* v. *Los Angeles*, 239 U. S. 394, 409-10; *Chicago, B. & Q. Ry. Co.* v. *Drainage Com.*, 200 U. S. 561, 594; *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110; *Chicago, B. & Q. R. R. Co.* v. *McGuire*, *id.* 549, 569; *Eberle* v. *Massachusetts*, 232 U. S. 700, 707; *Lincoln Trust Co.* v. *Williams Bldg. Corp.*, 229 N. Y. 313; *Anderson* v. *Steinway & Sons*, 178 App. Div. 507, 516, affirmed 221 N. Y. 639; *People ex rel. Publicity Leasing Co.* v. *Ludwig*, 172 App. Div. 71, 74, affirmed 218 N. Y. 540; *Tenement House Dept.* v. *Moeschen*, 179 N. Y. 325, 330, 336; *People ex rel. Nechamcus* v. *Warden*, 144 N. Y. 529, 535; *Cockcroft* v. *Mitchell*, 187 App. Div. 189, 193-5; *City of New York* v. *Herdje*, 68 App. Div. 370, 373-4; *In re Wilshire*, 103 Fed. 620, 622; *Hannah & Hogg* v. *Clyne*, 263 Fed. 599, 608; *Green* v. *Mayor*, 6 Ga. 1, 11.

In the case of *Chicago, B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 593, the court declared that:

> "If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use and a right to compensation, on account of such injury, does not attach under the Constitution. . . . There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property and though no compensation is given.' Sedgwick's Stat. & Const. Law, 434."

The injuries which an individual may suffer from the exercise of the police power of the State are deemed compensated to him by sharing in the general benefits which the regulations are intended and calculated to secure. *People ex rel. Nechamcus* v. *Warden*, 144 N. Y. 529, 535; *In re Wilshire*, 103 Fed. 620, 622.

The question, therefore, in every aspect in the end resolves itself into the inquiry whether the enactments under consideration are valid exercises of the police power of the State.

We have it on high authority that "the police power extends to all the great public needs," and that "it may be put forth in aid of what is . . . held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare"

(Holmes, J., in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 111). It is not for a court to find that the measure before it is the wisest or the best that could be enacted; the only judicial duty is to say whether, *in any aspect*, a reasonable legislative discretion could view the law in question as not arbitrary, and as desirable in the public interest. As stated by Judge Miller in *People* v. *Griswold*, 213 N. Y. 92, 96-7:

> "In determining whether statutory requirements are arbitrary, unreasonable or discriminatory, it must be borne in mind that the choice of measures is for the legislature, who are presumed to have investigated the subject, and to have acted with reason, not from caprice. Legislation passed in the exercise of the police power must be reasonable in the sense that it must be based on reason as distinct from being wholly arbitrary or capricious, but when the legislature has power to legislate on a subject, the courts may only look into its enactment far enough to see whether it is *in any view* adapted to the end intended. If it is, the court must give it effect, however unwise they may regard it, or however much they might, if given the choice, prefer some other measure as more fit and appropriate."

See also *Armour & Co.* v. *North Dakota*, 240 U. S. 510, 513; *Chicago, B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549, 569.

Viewed in the light of these settled criteria, there should be no doubt of the validity of the laws in suit. It would be shutting our eyes to what every one knows to deny the serious crisis and emergency to which these statutes are addressed and their reasonable necessity to the end they have in view. For many months a distracted public in densely populated centres had been threatened with tens of thousands of evictions from dwellings for no reason except the desire of landlords

to have possession in order to secure higher rents. For many months grossly exorbitant and extortionate demands for increased rentals had beset an even larger number of the public in large cities. The uncertainty whether the next week or month would find them homeless and without a shelter had alone been found and declared to be a serious menace to the public health by the Health Commissioner of the City of New York and certified by the Governor himself to the Legislature. The congestion of persons in city dwelling house property had increased to such an extent as to menace, not only the public health and safety, but ordinary human decency as well. The social unrest and discontent created and intensified by continued and apparently concerted arbitrary and oppressive demands of landlords for possession on the one hand, and for excessive rentals on the other, had become so widespread that impartial and responsible individuals writing in official reports, periodicals and the public press had expressed the gravest apprehension and concern for the continued good order of the community and the public safety. Indeed, in a number of instances unfortunate rent riots had already taken place, and violence resulting from similar situations abroad was and still is reported as part of the daily news, plainly admonishing the public and the Legislature of a grave menace. All this, and more, is disclosed in official administrative reports and is embraced in the brief but significant conclusions and findings of the Legislature in chapters 136, 942, 944 and 947 of the laws of 1920.

The crisis in New York, as has been above observed, is in fact but part of a similar emergency in many other parts of the United States. Thus, for example, a legis-

lative commission in Massachusetts on July 31, 1920, reported that—

> "During the past winter and spring the housing situation became so acute that it was necessary for the Commission to obtain assistance from the separate localities, as the complaints were becoming so numerous that it was impossible to handle them."

And the Massachusetts Legislature has enacted laws, modeled upon the New York statutes in many and most important respects, to meet the situation. (See chapters 554, 555, 577 and 578 of the general laws of Massachusetts for 1920.)

In Maine an act has been passed making it a crime to demand or collect an unreasonable or unjust rent (sec. 2, chap. 256, Public Laws of 1919, passed Nov. 7, 1919), and in Wisconsin chapter 16 of the laws passed at the special session of the Legislature of 1920 gives the Railroad Commission of that State comprehensive regulatory power over the entire subject (sec. 4). In section 1 thereof it is enacted and declared that—

> "The provisions of this act are made necessary by a public emergency growing out of the world war, resulting in such housing conditions in cities of this state that the freedom of contract in connection therewith has been impaired, and unjust, unreasonable and oppressive agreements for the payment of rent and for rental service have been and are now being exacted by landlords from tenants, which conditions seriously affect and endanger the public welfare, health and morals. It is also declared that this act is enacted as temporary emergency legislation *and that it shall terminate on April 30, 1923*, unless sooner repealed."

By section 3 it is provided that—

> "All rents, charges, or other terms or conditions for the use or occupancy of rental property

> and all services in connection therewith shall be reasonable and just."

Section 6 directs the Commission to fix and order just and reasonable rents and other terms and conditions for the occupancy of real estate, and other provisions of the law impose various civil and criminal penalties for violations of the act (secs. 12, 13, 14, 16 and 17).

To repeat, this crisis is now worldwide, and almost every European country has been constrained to the enactment of statutes far more drastic in their provisions than those now before the court. It is reported, for example (New York Tribune, October 30, 1920, p. 9), that in Warsaw—

> "Because of the housing shortage and the approach of cold weather the government has commandeered all rooms in private houses.
>
> "Only three rooms will be allowed for a family with children, without regard to the wealth or social position of the tenant."

And it is stated (New York Times, November 9, 1920) that—

> "The loan of 5,000 army tents, to be used by the City of Los Angeles as temporary dwellings, was asked of Secretary Baker by the City Council in a resolution adopted today [November 8th]. The resolution declared that 'a state of emergency' existed in the housing situation."

The State, it must be remembered, was not by the legislation in suit asking any landowner to give the use of his property to his tenant without adequate compensation. It was only requiring the landlord to be reasonable and just. It merely called upon him temporarily and during a grave public crisis, to forego his alleged right to evict his tenant without cause and to forego his power to extort an exorbitant and unreasonable com-

pensation for the dwelling space in which he was trading for profit as a business. On the other hand, the State required of the tenant the payment of reasonable compensation to the landlord for the home he occupied, no matter what that amounted to, on the peril of summary eviction if he failed in this regard. (See sections 5 and 6 of chapter 944 which provide for evicting the tenant who does not pay the fair and reasonable rent or rental value awarded by the law.) The State was thus requiring only such a concession as it has been repeatedly held by this court government is constitutionally entitled to require, namely, a concession appropriate to "exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent" (*Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, 531). See also *Clark* v. *Nash*, 198 U. S. 361, and *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110.

No fair and candid consideration of the circumstances can lead to the conclusion that the Legislature was acting without warrant in the facts or arbitrarily or oppressively in finding the public emergency it did, or beyond the bounds of reason in enacting the measures it did to meet and allay the existing emergency. If this be true, it must follow that these laws are valid exercises of the police power of the State.

It has been contended, however, that these laws are invalid because they benefit, not the community in general, but only one class of the community, namely, tenants; and that they are solely in the private, as contrasted with the public, interest because they redound to the benefit of

private parties, namely, tenants. But neither contention is true in fact or sound in law. "In discussing a public use" it is important to bear in mind "the inadequacy of use by the general public as a universal test" (*Strickley v. Highland Boy Mining Co.*, 200 U. S. 527, 531). The arguments referred to express views which would invalidate some of the best established examples of the due exercise of the police power. The borrower alone directly benefits by the usury laws; only the passenger or shipper personally avails of the benefit of the reasonable railroad rate; the tenement house dweller is the immediate beneficiary of the tenement house laws, and the particular workman who is injured receives the advantage of the employers' liability acts. But, nevertheless, it would be little short of preposterous to argue that these laws were in the private interest and hence took property for private use or benefit. As Mr. Justice Holmes pointed out in *Noble State Bank v. Haskell*, 219 U. S. 104, 110, 580:

> "It is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. . . . that among the public uses for which [property] may be taken [are] some which, if looked at only in their immediate aspect, according to the proximate effect of the taking, might seem to be private."

But the Legislature is not compelled to view the laws alone "in their immediate aspect". It may legitimately regard as a public concern and matter of general public interest, a situation involving the right to shelter of many thousands of men, women and children, the health and morals of an even larger number of individuals, the freedom of all of them from oppression, and the peace

and good order of our largest cities. Courts are not at liberty to circumscribe the police power of a State by impracticable points of view or by unreasonably pressing the alleged "absolute" rights of property. The police power exists to meet the practical problems which arise from day to day; and the science of government consists in adjusting relative rights and duties in order "to promote the general welfare." The admonition of this court in the *Noble State Bank* case must never be laid out of mind:

> "We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the State is limited by the Constitution of the United States, judges should be slow to read into the latter a *volumus mutare* as against the law-making power" (219 U. S. at p. 110).

It has also been objected on behalf of the landlords that the laws in suit are drastic, although it cannot be denied that they are reasonably necessary and plainly adapted to the emergency they contemplate and attempt to remedy. If the end be legitimate, the means are certainly appropriate and not arbitrary. They provide for reasonable rentals, and to that end they set up a system of procedure, which, in the first place, lays the burden of proof upon the landlord, within whose knowledge the relevant facts in this regard almost exclusively and peculiarly are, and, in the second place, requires him to fur-

nish the tenant a specification of those facts so that the latter may intelligently prepare for the trial of the issue of the reasonableness of the rent. The importance of and necessity for these provisions cannot be over-estimated, when one recalls that in the great majority of landlord and tenant cases the tenant is at a serious disadvantage, knows nothing of legal procedure, and comes into court without counsel to aid him. The power to enact such presumptions and alterations of the burden of proof and regulations of procedure calculated to make the truth appear and to place the parties more nearly upon a footing of equality in court, is too well settled to need discussion. *People* v. *Cannon*, 139 N. Y. 32, 43; *Sackheim* v. *Pigueron*, 215 N. Y. 62, 70; *Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U. S. 35, 42. It cannot for a moment be fairly asserted that the presumption of unreasonableness of rent raised in section 3 of chapter 944 where it appears that the rent demanded is larger than was paid a year prior, is arbitrary and has no basis whatever in fact, when it is remembered that in the vast majority of cases the rentals of a year ago were imposed upon tenants without any restraint of law and during a well-known period of housing shortage, and that the tenants had virtually to agree to whatever the landlord demanded, or else at once lose their homes.

On the other hand, these enactments require the tenant to pay into court a sum equal to the last month's rent as a condition precedent to availing of the statutory defense, and provide for his immediate eviction if he fail to pay the difference between any larger reasonable rental established in court and the amount theretofore deposited (chap. 944, sec. 6).

Nor is there anything unreasonable or unduly severe in the provisions of the laws which prevent a landlord

from oppressively repossessing himself of the dwelling property previously let to a tenant. If he requires it for his own use, or the tenant is objectionable, or he desires to rebuild, he may recover the property forthwith either in summary proceedings or in ejectment (chaps. 942 and 947). In other words, in every fair and reasonable situation he may have his property; but where he desires to evict without reason, the law prohibits his doing so during the shortage and crisis, provided the tenant pays the reasonable rental value of the premises. And this limitation, even the slightest reflections will disclose was necessary under the circumstances. All the requirements intended to secure reasonable rentals and protect present residents and citizens of the State would be at once nullified for all practical purposes, as we have already pointed out, if the landlord were entitled to recover possession at will.

If these enactments appear in any aspect extraordinary, it is only because the crisis is unprecedented; and it was long ago declared that (*Legal Tender Cases*, 12 Wall. 457, 540)—

> "It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times."

Thus, when an earthquake—as in San Francisco in April, 1906—causes the destruction of public records, the Legislature "possesses the power to remedy the confusion and uncertainty as to registered titles arising from the disaster," even though innocent persons lose their property as a result of the legislation (*American Land Co. v. Zeiss*, 219 U. S. 47, 60); or when a great strike threatens seriously to interfere with and interrupt interstate commerce, Congress has power to prevent it, even

by requiring the carriers out of their own funds to pay huge sums in higher wages to the employes until a voluntary adjustment of the controversy can be reached (*Wilson* v. *New*, 243 U. S. 332, 347-8); or when a conflagration threatens to spread, one may be authorized by law to destroy without liability real and personal property in the path of the fire (*Bowditch* v. *Boston*, 101 U. S. 16, 18-9); or when war, which is only one species of governmental emergency, makes necessary the calling of men to arms, the legislative power may suspend and stay legal proceedings against soldiers and sailors for even as long as several years (*Edmonson* v. *Ferguson*, 11 Mo. 344, 346; *Breitenbach* v. *Bush*, 44 Pa. St. 313, 318-9; *Hoffman* v. *Charleston Five Cts. Sav. Bank*, 231 Mass. 324; Soldiers & Sailors Civil Relief Act, 40 U. S. Stat. 444, ch. 20, secs. 100, 103, 201, 302); or when a war seriously disturbs economic conditions so that abnormally high prices result, the government may interpose, and even make it a crime, for an individual to sell necessaries at unjust or unreasonable prices (*Weed & Co.* v. *Lockwood*, 266 Fed. 785, 788; 41 U. S. Stat. 297, ch. 80, sec. 2).

No one would doubt that if an earthquake rendered thousands of citizens homeless, the Legislature would be empowered even to compel persons having dwelling places or owning shelter to quarter the refugees temporarily. The government of a State would not be forced to stand by helpless while hundreds of thousands of men, women and children were without shelter and in danger of freezing to death. Yet, in principle, such a situation is entirely similar to the one now before the court. It would surely be a grave criticism of our system of jurisprudence if it were once established as law that our state government was impotent to protect its citizens when

their need was greatest, and that the Constitution, which the people adopted to promote the general welfare, rendered the government incapable of caring for the general welfare in times of crisis, merely because private rights might suffer. Certainly, the framers of our fundamental law could not have entertained any such notion.

They must have been aware that from time immemorial, a feeble tenantry have been protected from oppression during times of emergency or misfortune. Thus, it is related in Gibbon's History of the Roman Empire (vol. IV, p. 499, Harper ed.) that—

> "If the feeble tenant was oppressed by accident, contagion, or hostile violence, he claimed a proportionate relief from the equity of the laws: five years were the customary term."*

The Jews lived through a crisis similar to the one now existing in New York City, and dealt with it in a manner analogous to that adopted by the New York Legislature. During the Middle Ages, the Jews were confined to the ghettoes and their settlement in villages was restricted. As they were forbidden to own land, they were obliged to rent both dwelling and business places in the limited areas in which they were permitted to stay and do business. It often happened that as soon as the landlord discovered that the tenant was able to make a living in the place where he settled or was successful in his business, the landlord would raise the rent of the dwelling place

* Baxter, a leader among the Puritans, wrote in his "Christian Dictionary," published 1673, and in "Cases of Conscience," pt. III, ch. XX, as follows:

> "*An oppressor is Anti-Christ and Anti-God.*" §11.2.
>
> §8.6. "Especially unmerciful Landlords are the common and sore oppressors of the County-men: If a few men can but get money enough to purchase all the Land in a County, they think that they *do with their own as they list* and set such hard bargains of it to their *Tenants*, that they are all but as their servants, yea, and live a more troublesome life than servants do: When they have laboured hard all the year, they can scarce scrape enough to pay their Landlord's rent."

See also Isaiah, 5:8; Nehemiah, 5:11 & 12.

or store to a large amount, and when the tenant was unwilling to pay the rent which the landlord demanded, the landlord would find another Jew to whom he would rent the place, and in this way "the first Jew lost his living to the second." Within the ghetto, however, the law administered by the rabbis was controlling upon the Jews. In order to save the Jews in the settlement from this form of rent profiteering, to prevent ruinous competition for premises among Jews, and to enable them to maintain themselves economically, the rabbis deduced from the Talmud the law of Hazakah, implying a prior right on the part of the tenant in possession to continue, even without lease, as against another Jew offering to outbid him, and they instituted a regulation excommunicating any Jew who rented a dwelling place or store over the head of another Jew already in occupancy.*

* See Eisenstein's Ozar Haddinim—A Digest of Jewish Law (1917) pp. 129-130 (printed in Hebrew and at the New York Public Library, Department of Semitic Literature) and also Ozar Yisrael, Vol. IV (1910) at p. 265 (also at Public Library). See also article by Nathan Isaacs, formerly Professor of Law and Assistant Dean, University of Cincinnati Law School, 1919-20 Thayer Teaching Fellow at Harvard Law School, now Professor of Law in the University of Pittsburgh, in *The Menorah Journal*, Vol. VI, No. 5, October 1920, entitled "Jewish Law in the Modern World," p. 258, especially at the foot of page 263, and pages 264 and 265.

The following regulations were passed June 21st, 1554, by delegates of the Jewish congregations of Rome, Ferrara, Mantua, Romagna, Bologna, Reggio, Modena and Venice:

"(v) Whereas there are many who infringe the tekanah of Rabbenu Gershom, which forbids any Jew from ousting another Jew from a house rented from a Christian landlord, and whereas such offenders claim that when the landlord sells his house the Jewish tenant thereby loses his chazaka (i. e., his rights of preferential tenancy), we therefore decree that though the Christian owner sell his house, the right of the Jewish tenant to retain possession is unchanged, and any Jew who ousts him is disobeying the tekanah of R. Gershom and also this tekanah, now newly enacted."

"The fifth clause is perhaps the earliest instance of the JUS CASACA, which gave the Jewish tenant of a Christian's house in the ghetto a right in that house which no other Jew could usurp. . . . Clement VIII legalized this Jewish arrangement by practically making evictions impossible so long as the rent (also fixed by him) was duly paid. . . . Similar laws of CHAZAKA were applicable to Jewish landowners; Duran, for instance, reports a tekanah which rendered it unlawful for a Jew to evict a fellow Israelite by raising the rent or by any other device whatsoever." (Abrahams: Jewish Life in the Middle Ages, p. 69.)

In Responsum 41 from the Sheelot u-Teshubot, [Responsa] of Rabbi Meir of Padua [Rabbi Meir ben Isaac Katzenellenbogen], ed. Fuerth, 1776, it appears that this regulation, prohibiting violation of the equity of tenants in possession, under penalty of excommunication, was in force throughout all of Italy.

Nothing can be clearer than that one of the inherent and fundamental purposes of all civilized government is to prevent extortion and oppression and to safeguard the public; and in the light of that principle all constitutions must, of course, be read. While it is obviously impracticable for the government to prevent every individual and fortuitous instance of extortion or oppression and safeguard against every public menace, its power must obviously be recognized to be equal to the prevention of clear and widespread oppression and public danger. The law, both ancient and modern, abundantly illustrates this power of government and its use even at the expense of individual property and contract rights.

The history of the doctrine of the equity of redemption affords a familiar example. The contract of the parties to a mortgage was that if the debtor failed to pay at the appointed time, the land should at once become the property of the mortgagee. Nevertheless, the courts of chancery long ago intervened to relieve against the forfeiture. The reason was that in that time a man's house and lands were both his home and his means of livelihood; and if he lost them, he was virtually turned out into the open road to beg or prey upon the public. Society found itself threatened with a large increase in the number of outlaws, mendicants and bandits, if it continued to give free rein to the strict contract and property rights of mortgagees, and, therefore, the modern rule creating the equity of redemption was evolved, and the public safety thus protected and cared for and oppression of mortgagors prevented in the public interest and at the expense of individual contract and property rights.

Again, it was early realized that there were many callings and businesses to which the public necessarily had to resort and in which, therefore, they had an interest. If these were to be left undisturbed by the law, it was patent that they would in numerous instances have practically unlimited power to oppress the public. Accordingly, government was called upon to protect the public from extortion, and both then and now callings and property charged with a public interest have been regulated by the State. What shall be so regulated depends entirely upon the peculiar economic and social conditions of the times. At common law doctors, farriers, victuallers, millers, tailors, bakers and many others, whom we would to-day regard as engaged in purely private pursuits, were regulated and controlled and compelled to serve all by the law, because of the potentiality for oppression which then inhered in those callings and businesses and the well-defined public interest which in consequence thereof then attached to them. See chap. I of Wyman's "Public Service Corporations."

It was not necessary that persons thus subjected to regulation should have a monopoly—though that element if it existed, served to emphasize their capacity to do public harm at will; or that they should enjoy a special privilege or franchise—though that might serve to make clearer their duty to the public. *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391. Speaking of the cases cited, this court said in *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 411:

> "They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate to apply the language of Judge Andrews in *People*

> v. *Budd* (117 N. Y. 1, 27), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported. '*The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.*'"

The public interest which warrants the regulation of such ordinary, private, competitive and unfranchised businesses as grain elevating (*Munn* v. *Illinois*, and *Budd* v. *New York*, *supra*), fire insurance (*German Alliance Ins. Co.* v. *Kansas*, *supra*), laundrying (*Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 337-8), bread baking (*Mobile* v. *Yuille*, 3 Ala. N. S. 140; *Louisiana Bread Case*, 12 La. Ann. 432), etc., is incomparably smaller than that which underlies the exertion of the legislative power over the business of renting apartments and houses for dwelling purposes in densely populated cities like New York. In the Alabama case cited, which was approved in *Munn* v. *Illinois*, 94 U. S. at p. 129, the court, in sustaining an ordinance regulating bakers, prescribing the weight of loaves of bread and fixing the prices at which they should be sold, said (3 Ala. N. S. at p. 141):

> "Where a great number of persons are collected together in a town or city, a regular supply of wholesome bread is a matter of the utmost importance."

If that was a sufficient public interest to justify the regulation of bakers in ordinary times, it cannot be reasonable to deny the right of the State to regulate dwelling house owners in times of extreme shortage of housing accommodations. "Where a great number of persons are collected together in a town or city" like the City of New York, an adequate supply of housing "is a matter of the

utmost importance." If tenement and apartment house dwellers may all be evicted by landlords, by far the largest part of the population of the city may be dispersed in spite of the city, the State and the people themselves. The right to engage in the business of renting dwelling space to others is no more sacred than the right to engage in the business of renting storage space in grain elevators to others, and it would seem that, under appropriate circumstances, either may lawfully be laid under necessary compulsions in the public interest.

As this court has declared, "it would be a bold thing to say that the principle [warranting public regulation of private property and business] is fixed, inelastic, in the precedents of the past and cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses today" (*German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 411). The vital principles of government, it is submitted, have not thus become static or fallen into decadence, but, on the contrary, are still progressive and competent to deal practically with extortion, oppression and emergency wherever and whenever they appear.*

From time immemorial the government of England has exercised the power to forbid any and all practices which had the effect of unduly enhancing the price which

* The Massachusetts constitutional convention proposed and the people in 1917 adopted, a constitutional amendment providing that—

"The maintenance and distribution at reasonable rates during time of war, public exigency, emergency or distress, of a sufficient supply of food and other common necessaries of life and the providing of shelter, are public functions, and the commonwealth and all the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court shall determine."

the people must pay for necessaries. "Forestalling the market," "engrossing the market," and "regrating" were offenses at common law. 4 Tucker's Blackstone, pp. 159-60. The ultimate object of these rules of law was obviously to prevent those dealing in the necessaries of life from extorting from the consumer unreasonable prices. The purpose and object of these common-law rules and their relation to freedom of contract or trade are well shown in the case of *King* v. *Waddington*, 1 East 143, 163 (1800), where the court said:

> "In mitigation of punishment the court has been repeatedly and strongly addressed upon the freedom of trade; as if it were requisite to support the freedom of trade that one man shall be permitted for his own private emolument to enhance the price of commodities become necessaries of life, and thereby possibly prevent a large portion of his majesty's subjects from purchasing those necessities at all. The freedom of trade, like the liberty of the press, is one thing; the abuse of that freedom, like the licentiousness of the press, is another. God forbid that this court should do anything that should interfere with the legal freedom of trade. . . . But the same law that protects the proprietors of merchandise takes an interest also in the concerns of the public, by protecting the poor man against the avarice of the rich; and from all time it has been an offense against the public to commit practices to enhance the price of merchandise coming to market, particularly the necessaries of life, for the purpose of enriching an individual. The freedom of trade has its legal limits."

From the earliest times the British Government has never hesitated either actually to fix prices when other means proved unavailing, or to require, in general terms, that vendors of necessaries shall sell them at reasonable prices and moderate gains. Wages, herrings, clothes, poultry, candles, hats, beer, wine, butter, cheese, bread

and numerous other commodities were thus from time to time regulated as necessity required, at common law.* That the power to enact such laws passed to the several States has always been recognized. In *Munn* v. *Illinois*, 94 U. S. 113, 125, the court, after referring to regulatory laws of this character enacted both in England and in the District of Columbia prior to the adoption of the Fourteenth Amendment, said:

> "From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation."

And it has never been held that such regulation in time of shortage and public emergency in order to prevent widespread public oppression and suffering, unlawfully deprived an individual of his property, merely because it prevented him from reaping the gains of an extortionate and oppressive use of his own. The vivifying principle was always in the maxim, *Sic utere tuo ut alienum non laedas.*

No one would now question the right of a State to fix the rate of interest and thereby abridge the liberty of contract and the right of property. Yet, while no one entertains a doubt of the power of the Legislature thus to limit the compensation of a mortgagee to a fair and

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* See Statute of Laborers (1349), 2 Stat. of Eng., pp. 26, 28, ch. VI; Statute of Herrings (1357), 2 *id.*, p. 117; Statute of 1363, 2 *id.*, p. 162, ch. III, V, XV; Statute of 1389, 2 *id.*, pp. 313-4, ch. VIII; Statute of 1433, 3 *id.*, p. 196, ch. XII; Statute of 1487, 4 *id.*, p. 41, ch. VIII; Statute of 1531, 4 *id.*, p. 220, ch. V; Statute of 1533, 4 *id.*, pp. 263-4, ch. II; Statute of 1536, 4 *id.*, p. 439, ch. XIV; Statute of 1549, 5 *id.*, p. 347, ch. XXI; Statute of 1709, 12 *id.*, p. 77, ch. XVIII.

reasonable return upon the money which he has invested in a tenement or apartment house and which is hardly ever less than two-thirds of its entire value, it is, nevertheless, claimed that the mortgagor of such property with a far smaller investment therein ought to be free to earn an unreasonable and even an oppressive return thereon. It is no answer to this contention to assert that the usury laws furnish no analogy since they are in reality a relaxation of a prohibition of the common law against charging any interest at all; for, as the court pointed out in *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. at p. 409, "this explanation overlooks the fact that both the common law and the act of Parliament [altering it] were exercises of government regulation of a strictly private business in the interest of public policy, a policy which still endures and still dictates regulating laws." The laws against usury were obviously directed to the purpose of preventing unconscionable lenders from extorting oppressive profits and preying upon the necessities of borrowers. They were plain examples of laws preventing oppression enacted at the expense of freedom of contract and individual property rights for the benefit of borrowers, a class far less in number than the tenant class. *State* v. *Cary*, 126 Wis. 135, 138.

The usury laws are an illustration also of the right of the Legislature to conclude that in certain relations it is in the great majority of cases impossible for the parties to deal at arms' length and with unimpaired freedom of will, and, consequently, that the Legislature may in such instances refuse force and effect to contracts so made or require them to be modified so as to conform to justice and fairness. In the leading case of *Holden* v. *Hardy*, 169 U. S. 366, 397, this principle was exemplified

in a case upholding a statute regulating the hours of labor of men employed in mines and smelters, the court saying:

> "The legislature has recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. . . .
>
> "The fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality or where the public health demands that one party to the contract shall be protected against himself."

It should follow reasonably that it was entirely within the competency of the Legislature of the State of New York to find, as it did in section 1 of chapter 944 of the laws of 1920, that for all practical purposes "the freedom of contract has been impaired" as between landlords and tenants in the City of New York, and to undertake to protect the tenants from "unjust, unreasonable and oppressive agreements for the payment of rent" by forbidding such contracts to be enforced against the party laboring under the disadvantage.

This portion of the legislation in question is but a new definition and extension of the ancient defense of duress to new economic conditions and circumstances. The Legislature certainly has the power to regulate and modify common law and equitable defenses. *Arizona*

Employers' Liability Cases, 250 U. S. 469, 421. Indeed, the common law itself has undergone a progressive evolution in respect of this very defense. The history of the defense of duress is thus set forth in *Van Dyke* v. *Wood*, 60 App. Div. 208, 212:

> "The principle upon which men are relieved from their contracts procured by duress has been greatly extended in recent years. In the time of Lord Coke no one would have been permitted to avoid his contract for duress, unless the duress was such as not only to put him in fear of illegal imprisonment or great bodily harm, but went so far as to be something that a man of ordinary firmness would not be able to resist. . . . But gradually and by slow degrees the strictness of the rule was abated until finally it has come to be the rule of law in this country . . . that where one is presented with the contingency of serious loss or damage to his property or of a submission to an extortionate claim, if he pay the claim or make the contract which is extorted from him it is not to be considered a voluntary act, and it may be set aside on the ground of duress."

See further on this subject the opinion in *78th Street & Broadway Co.* v. *Rosenbaum*, 111 Misc. 577.

The foregoing views have had emphatic approval in a recent decision rendered by three federal judges (Baker and Evans, Cir. JJ., and Geiger, D. J.) in the District Court of the United States for the District of Indiana in the case of *American Coal Mining Company* v. *The Special Coal and Food Commission of Indiana*, decided September 6, 1920, but not yet reported.

In that case a bill was filed to enjoin as unconstitutional the legislation of the State of Indiana creating a coal commission with authority, *inter alia*, to fix just and reasonable prices at which coal should and must be sold in intrastate commerce in Indiana. The act plainly proceeded upon the assumption that coal had, by reason

of shortage and emergency, become a commodity affected with a public interest, and which the State, therefore, had a right to regulate in that interest. The court dismissed the bill, and held that the enactment was constitutional, declaring that the State had the power thus to regulate the theretofore private business of mining and selling coal. The opinion is too long to quote here, but is printed in full in the pamphlet of opinions submitted herewith (p. 204).

The decision of a divided court in the District of Columbia in *Hirsh* v. *Block*, 267 Fed. 614, is, it is submitted, erroneous, but it is in any event plainly distinguishable from the case at bar. The Act of Congress there involved attempted to regulate all rental property—stores, offices and hotels as well as dwellings—and denied to the owner the right of trial by jury, which the statutes at bar carefully preserve. The case involved only the right to the possession of a store to be used for business purposes solely and not dwelling house property at all.

VI.

THE ABOLITION OR LIMITATION OF THE LANDLORD'S RIGHT TO EVICT A TENANT IN POSSESSION AS DEVELOPED BY HISTORICAL EXPERIENCES.

It has often been argued, and indeed was urged below, that as Great Britain and Ireland and other countries have no written consitution restraining or limiting the legislative power of government, reference to historical precedents there or elsewhere was quite immaterial upon any questions as to the extent of legislative power, federal or state, in this country where governmental power is controlled or limited by constitutional limitations. But this contention wholly disregarded the

fact that American courts are constantly studying English history and English statutes in order to determine whether a particular exercise of legislative power is or is not within the principle of due process of law, or is or is not arbitrary and unduly oppressive. Numerous and familiar instances will readily recur to the court. The leading case is, of course, that of *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276, where Mr. Justice Curtis, speaking for the whole court, delivered his most famous opinion; and a federal tax statute was there held to constitute due process of law because, among other reasons, it was found to be in accordance with precedents in English history. What is generally or widely accepted as reasonable and necessary in civilized countries is in almost every instance certain to be in fact reasonable and necessary *everywhere*, and it would be folly to reject the aid to be thus derived from the experiences of others when the fundamental inquiry is, as here, whether the legislation in question is or is not arbitrary. The same causes in human experience produce generally the same effects, and the experience of other civilized peoples may have their lessons for us. Hence the pertinency and appropriateness of the discussion which now follows.

Emergencies involving the occupancy of land have arisen and been dealt with in the past, first by communal custom, and then by legislation which converted the customs and legally unenforcible obligations into positive law. History has again and again evolved as a fair and proper remedy in such cases the restriction of the right to evict, the recognition of the tenant's right of renewal, and the fixing of rentals by disinterested bodies, and surely such regulation cannot be regarded as wholly arbitrary now and in America.

From the earliest times, the occupancy of real estate has carried with it certain tenant rights. The whole history of the development in England of title in fee to real estate is associated with limitations in behalf of tenants in occupancy. The English copyhold tenure starts at a point where there is nothing but occupancy: where the villein cultivator of the lord's demesne held his land at first at the unfettered will of the lord, and then ultimately reached security of tenure. The fact that his name was on the rolls of the manor "built him by slow degrees a fortress against unjust exactions and summary ejectments." Montgomery, Land Tenure in Ireland, pp. 90, 91; Field, Landholding and the Relation of Landlord and Tenant, 2nd ed., p. 23.

In France, from very early days, there could be no eviction or annulment of a lease of agricultural lands otherwise than through judicial tribunals. "The tenant is seldom turned out, as long as he conducts himself well and does not deteriorate the land; and in many parts of France, the farm, though let on short leases, continues in the hands of the same family from father to son. The judge has a discretionary power to use indulgence towards tenants whom he considers hardly dealt with, and may grant them time for the payment of their rent" (Field, p. 65).

John Stuart Mill, writing in 1879, referred to the fact that "in many countries of Asia . . . it was held unlawful to evict [tenants of land] while they paid the rent—a rent not in general fixed by agreement, but by the custom of the neighborhood," and he also referred to the fact that in Tuscany the metayer farmer was guaranteed by custom a permanent possession so long as he fulfilled the customary conditions of his tenure (31 Fort-

nightly Review, p. 513; Chapters on Socialism, pp. 528, 529).

Perhaps nowhere else in the world has custom had so much influence upon the rights of tenants in preventing summary evictions and securing fair rents as in Great Britain and Ireland. Under the English system, writes Shaw-Lefevre in "Agrarian Tenures," tenants held "as a rule on yearly tenancies, but they have confidence in the long-established practice and traditions of the estate, and in the honour and good faith of the owner. They know that they will be allowed to remain as tenants as long as they do justice to the land and that on quitting their farms they will be treated with every consideration" (pp. 23-4). O'Brien declares that (Economic History of Ireland in the 18th Century, pp. 68-69): "In England, the tenant farmer was encouraged to improve his land, knowing that, at the expiration of his lease, he would be granted a renewal at a reasonable rent; but in Ireland the tenant knew that the only consequences of improving his land would be that in a few years some poor wretch without capital or resources would be tempted to bid some utterly exorbitant sum for a lease of it."

The Report of 1729 on the causes of Protestant emigration from Ulster states that the agents of absentee landlords habitually let the lands by auction to the highest bidder. They turned tenants out of their holdings without compensation for improvements and let the farms to new tenants on short leases and at rack rents. Field quotes as follows from the remonstrance sent by the northern Protestants to the Government in 1772 (Landholding and the Relation of Landlord and Tenant in Various Countries, n. 9, p. 270):

> "When the tenant's lease was ended [the landlords] published in the newspapers that such a parcel of land was to be let, and that proposals in writing would be received for it. They invited every covetous, envious and malicious person to offer for his neighbour's possessions and improvements. The tenant, knowing he must be the highest bidder or turn out he knew not whither, would offer more than the value. If he complained to the landlord that it was too dear, the landlord answered that he knew it was so, but as it was in a trading country, the tenant must make up the deficiency by his own industry."

In 1772, Field writes (p. 271), Lord Donegal demanded a hundred thousand pounds in fines for the renewal of a number of leases which terminated at the same time. The tenants being unable to pay these large amounts, offered the interest on them in addition to the old rent. The offer was refused, and some speculators paid the fines and took the lands over the heads of the tenants with a view to making money by sub-letting. Another large proprietor followed the example. Some six or seven thousand families were, in consequence, turned out of their holdings, which their labor and that of their fathers had reclaimed and made valuable. Those who could emigrated to America. Those who were too poor to emigrate remained to increase the discontent, which so often burst forth in terrible crime.

In Ireland, the custom of auctioning leases of farms over the head of the outgoing tenant was called "*canting*" (O'Brien, Economic History of Ireland, p. 68), and Swift describes the landlords as "*canting*" their own lands upon short leases and sacrificing their oldest tenants for a penny an acre advance. "It is now [1793] the almost universal mode of letting land in Ireland for the landlord to advertise his land at the expiration of the

lease to be let to the best and highest bidder, and to let them accordingly" (Irish Parliamentary Debates, vol. XIII (p. 114; vol. VI, p. 435, cited by O'Brien, p. 68, note 2). "When a lease has expired," says Crumpe in his essay "On Providing Employment," cited by O'Brien (p. 68, note 3), "the lands are advertised to be let to the highest bidder; the proposals of each are kept secret, and by this unfair species of auction a promise of an exorbitant rent is obtained, very frequently to the exclusion of the former occupier, who is considered as having no stronger claim to them than the most perfect stranger, unless he exceed him in the amount of the proposed rent." This practice of absentee landlords "forced rents unnaturally high," with an effect not dissimilar to that giving rise to the present laws in New York. Montgomery says (at p. 93) that the Irish tenant—

> "to whom land was a necessity, undertook to pay more than he was able. 'The tenant was ruined by his liability to a charge out of all proportion to what the land could naturally produce, at any rate for a continued period, and the landlord became embarrassed by bankrupt tenants.' "

And in "Ireland and England" by Turner, p. 195, the author says:

> "One easily imagines the economic deterioration and abasement of character which attended such circumstances as these. Legally the landlord had nearly complete power over the soil, the tenant no security of possession. . . . Custom did something to mitigate the hardness of the law. In Ulster and less definitely in the rest of Ireland, there prevailed a tenant-right which provided that so long as the tenant paid his rent and held to the conditions of his lease, he must have undisturbed possession; and that when he gave up possession he might sell his interests in the holding. Where this custom had most prevailed, it had come to give the tenant a considerable security, and ten-

> ants bought and sold their interests as a form of property. It was absolutely unprotected by law, but so firmly was it founded upon custom that in Ulster tenant-right was estimated to have a selling value of £20,000,000. While this custom worked in some ways to the disadvantage of the tenant, yet generally it was so far superior to the condition recognized by law, that where it prevailed usually estates were improved, and tenants, and sometimes landlords, prospered more greatly."

The Parliamentary Commission to Investigate Conditions in Ireland of 1830 found "misery and suffering which no language can possibly describe," and urged Parliament to "consider what means can be devised to diminish this mass of suffering and at the same time to secure the country a better condition, promoting a better management of estates, and regulating the relations between landlord and tenant on rational and useful principles" (History of Landholding in Ireland (1877), Fisher, pp. 111-2).

In Ulster there prevailed what was there known as the tenant-right or good-will, and conditions in Ulster were more satisfactory on that account than they were in other parts of Ireland. The act of 1870, which was the first act passed by Parliament for the relief of tenants, recognized this Ulster tenant-right. Montgomery, describing its status prior to the legislative enactment, says that it was "a thing at that time absolutely without the sanction of law" and—

> "Consisted of an assumed right on the part of the tenant to sell the good-will of his holding subject to its rent. Such a custom was naturally regarded from different points of view by the landlord and the tenant. This is well illustrated by two definitions of tenant-right quoted by Mr. Seebohm. The landlord defines it thus: 'tenant-right is a custom under which the tenant farmers in

> the north of Ireland—or, at all events, in those districts where the custom prevails—expect when they have occasion to give up their farms, that their landlords will allow them to obtain from the incoming tenant such a sum as shall remunerate them for their improvements upon those farms . . . and for the good will of the farm.' From the standpoint of the tenant it is defined as follows: 'tenant-right I consider to be the claim of the tenant and his heirs to continue in undisturbed possession of the farm so long as the rent is paid; and in case of ejectment, or in the event of a change of occupancy, whether at the wish of the landlord or tenant, it is a sum of money which the new occupier must pay to the old one for the peaceable enjoyment of his holding.'" (Land Tenure in Ireland, p. 119.)

The Irish Land Act of 1870 not only legalized this custom of Ulster, but all like customs in other parts of Ireland, and gave to tenants who held under them the protection of the law (Shaw-Lefevre, Agrarian Tenures, p. 104).

The Bessborough Commission, appointed in 1881 to investigate conditions in Ireland, reported that the raising of rents under these circumstances created great distress and injustice (Shaw-Lefevre, p. 110). This commission reported in January, 1881. It appeared to them, says Field, summarizing their report (pp. 321-4):

> "That the conditions under which land had been held by yearly tenants in Ireland had been such that the occupiers had, as a general rule, acquired rights to continuous occupancy, which, in the interest of the community, it was desirable legally to recognize. Taking then as a guide the principle of giving legal recognition to the existing state of things, they proposed the enlargement of the tenancy from year to year into a new kind of statutory tenure, defeasible only upon a decree of the Land Court for the breach of certain well-ascertained conditions, and held, subject to

the payment of a rent, the amount of which should in the last resort be fixed, neither by the landlord nor by the tenant, but by constituted authority. In a word, so far as yearly holdings under the Act of 1870 were concerned, the Commission advocated the reform of the Land-law of Ireland upon the basis of the three 'F's'—Fixity of Tenure, Fair Rents and Free Sale. . . .

"The principle is invoked of 'freedom of contract' and it is asked whether in this case alone there exists an exception to the principles which promote the wealth of a community. On this subject of freedom of contract, we have a few words to say. The proposal of settling rent by authority is undoubtedly inconsistent with the ideal freedom of contract between landlord and tenant, which the act . . . postulates and which is by many imagined to exist. That ideal pictures the landlord as possessor, and the tenant as desirous of possession, bargaining together and coming to an agreement, by which land in the landlord's possession is transferred, under certain conditions of proper cultivation, rent-payment and ultimate restitution, to the tenant. But what are the facts? It is, in the large majority of cases, the tenant, and not the landlord, who is, and has been for years, in possession of the holding. The process of bargaining may end, and under the Land Act of 1870 is bound to end, unless the tenant submits to the landlord's demands, with a dispossession of the tenant by the landlord, against which there is no resistance possible and no appeal. An ejected farming tenant in Ireland has nothing to turn to, except the chance of purchasing another holding, the offers of which are limited and the prices high. Not to come to terms with his landlord means, for him, to leave his home, to leave his employment, to forfeit the inheritance of his father, and to some extent, the investment of his toil, and to sink at once to a lower plane of physical comfort and social rank. It is no matter to him of the chaffer of the market, but almost of life and death."

The majority of the Bessborough Commission, therefore, came to the conclusion that some procedure in the nature of an arbitration or of a trial at law must be provided for the settlement of disputes arising either through the desire of the landlord to raise the rent or of the tenant to have it lowered. And Field comments as follows (p. 324, note 1):

> "In India this procedure has existed since we obtained possession of the country."

The reference of the question of rent to judicial authorities for decision was stated in Parliament to be the core of the bill of 1881. See "The Times" of May 28, 1881, p. 9, col. 1, cited by Field (p. 324, note 1).

The Irish Land Act of 1881 extended further the principles of the Act of 1870, and was passed because the Act of 1870 afforded insufficient security against its infraction and evasion by the frequent raising of rent (Shaw-Lefevre, p. 108). It was based, as has already been stated, upon the policy known as the "Three F's" —free sale, fixity of tenure and fair rents. By the first, tenants at will were empowered to sell their occupation interests; by the second, the tenant was secured from eviction except for non-payment of rent, and by the third, the tenant was given the right to have a "fair rent" fixed by a newly formed Land Commission Court, the element of competitive bidding being entirely excluded. The Act of 1881, says Shaw-Lefevre, "was one of the greatest agrarian reforms ever conceived and enacted for any country. It secured to the main body of tenants, throughout Ireland, fixity of tenure, and the right of assigning and devising their holdings to any other person, without the leave of the landlord; it gave them the right to appeal to a special tribunal to decide as to what should be the rents for their holdings" (p. 113).

It farther provided that the tenant could be deprived of his holding only upon the breach of one of six statutory conditions laid down in the act, and furthermore that if—

> "The acceptance by a tenant from year to year of a lease of his holding containing terms which, in the opinion of the Court, were at the time of such acceptance unreasonable or unfair to the tenant, having regard to the provisions of the said Act, was procured by the landlord by threat of eviction or undue influence, the Court may, upon the application of the tenant made within six months after the passing of this Act, declare such lease to be void as and from the date of the application or order, and upon such terms as to costs or otherwise, as to the Court shall seem just; and thereupon the tenant shall as and from such date be deemed to be the tenant of a present ordinary tenancy from year to year at the rent mentioned in such lease." [Land Law (Ireland) Act, 1881, 44 and 45 Vict. Ch. 49, p. 190.]

But the tenant-right obtaining in Ulster also prevailed in other parts of Ireland. As Shaw-Lefevre says (p. 114):

> "The best landlords in other parts of Ireland had practically acted upon the same understanding in their transactions with their tenants; that free contract, on which, theoretically and in point of law, the relations of landlord and tenant in Ireland were based, did not, and could not, virtually exist under the existing conditions; that the tenant was unable to disengage himself from his interest in his holding, so as to contract on equal terms with his landlord with respect to future rent."

And Shaw-Lefevre concludes that "the legislature was bound to give protection to the tenants against unjust appropriation of their interests by the raising of rents."

The Scotch crofters went through the same experience as the Irish tenants. In 1886, when the Home Rule

Bill for Ireland was under discussion, Parliament passed the well-known Crofters' Act, framed on the general lines of the Irish Act of 1881, extending to the Scotch crofters the benefit of fixity of tenure and judicially fixed rents. The act passed, says Shaw-Lefevre (p. 191), "without opposition in the House of Commons, and without any denunciation or complaints that it was a measure of confiscation, or even an unjust invasion of the rights of landlords. This is the more remarkable when it is considered that the Act dealt with arrears of excessive rents as well as with future rents." The Crofters' Act conceded but two of the "three F's" to the Scotch tenant, namely, "fixity of tenure" and "fair rents" to be fixed by an independent tribunal. It did not confer the right of "free sale." In consequence, the Scotch crofter could not assign his interest in his tenancy. Shaw-Lefevre, however, points out that this feature resulted in a measure of protection to the tenant, and that it resembled in principle the homestead laws in the United States.

The tenant's right of renewal in equity was very early made the subject of consideration in Irish courts of equity. In *Boyle* v. *Lysaght*, Vernon & Scriven's Reports, vol. I, 1786-88, pp. 142-6, Viscount Lifford, Lord Chancellor, referred to the great difficulties that arose in courts of equity concerning leases. He said (p. 144):

> "It happened that tenants neglected to make renewals upon the fall of the lives, and were guilty of great laches: the landlords thereupon brought ejectments, and the tenants resorted to courts of equity for relief; and courts of equity, where the breach was made up by an adequate compensation, thought that they were entitled to relief. . . . Courts of equity were very glad to lay hold of that rule, and in every case that came be-

> fore them afterwards, they held that the tenant was entitled to a renewal upon those terms, except in cases of fraud or dereliction."

Lord Chancellor Lifford had held, in the leading case of *Murray* v. *Bateman* (Ridgeway's Cases in Parliament, 187), that there was a "local equity" or "old equity of the kingdom," which, despite the clear laches of the tenant, entitled him to a renewal of the lease even though the period had long since expired.* The House of Lords in *Murray* v. *Bateman*, however, reversed Lord Chancellor Lifford. But the act of 19 and 20 George III, 1779-80 (statutes passed in Ireland, pp. 609-10), was passed "for the relief of Tenants holding under Leases for Lives containing Covenants for perpetual Renewals." The recitals of this act refer to the frequent neglect of tenants "to pay or tender such fines within the times prescribed by such covenants," declare that great distress and much confusion will result in the kingdom, and recite that "whereas it has been for a long time a received opinion in this kingdom, to which some decisions in courts of equity and declarations of judges have given countenance, that courts of equity would in such cases relieve against lapse of time upon giving an adequate compensation to the persons to whom such fines were payable, . . . and to the end that such interest may not be defeated by a mere neglect, where no fraud appears to have been intended," it is enacted—

> "That courts of equity upon an adequate compensation being made, shall relieve such tenants and their assigns against such lapse of time, if no circumstance of fraud be proved against such tenants or their assigns; unless it shall be proved to the satisfaction of such courts, that the land-

* This doctrine was approved and followed in Maryland in 1876 in *Banks* v. *Haskie*, 45 Md. 207, 224. See also *Myers* v. *Silljacks*, 58 Md. 319, and *Swan* v. *Kemp*, 97 Md. 686.

lords or lessors, or persons entitled to receive such fines, had demanded such fines from such tenants or their assigns, and that the same had been refused or neglected to be paid within a reasonable time after such demand."

In *Lee* v. *Vernon*, 5 Brown's Parl. Rep. 10 (Irish Reports), March 11, 1776, the syllabus is as follows:

> "It has long been an established practice to consider those who are in the possesison of lands under lease for lives or years, as having an interest beyond the subsisting term . . . which though not any certain or even contingent estate, there being no means of compelling a renewal, yet it is so adverted to in all transactions relative to leasehold property, that it influences the price in sales, and is often an inducement to accept of it in mortgages and settlements."*

In our own day, the statute of 6 Edward VII (1906), c. 56, provided, in the case of agricultural holdings (sec. 4), that—

> "Where the landlord, without good and sufficient cause, and for reasons inconsistent with good estate management, terminates a tenancy by notice to quit, or, after having been requested in writing, at least one year before the expiration of a tenancy, to grant a renewal thereof, refuses to do so, or where it has been proved that an increase of rent is demanded from the tenant . . . the tenant quitting the holding shall, in addition to the compensation (if any) to which he may be entitled in respect of improvements, and notwithstanding any agreement to the contrary, be entitled to compensation for the loss or expense directly attributable to his quitting the holding which the tenant may unavoidably incur upon or in connection with the sale or removal of his household goods, or his implements of husbandry, produce or farm stock, on or used in connection with the holding."

* Old English text writers, under the title "Tenant Right of Renewal," adopt this statement as part of the law of Landlord and Tenant. See Woodfall, The Law of Landlord and Tenant, 19th ed., 1912, p. 445.

The Scotch Small Landholders' Act of 1911 (1 and 2 Geo. V, Statutes, vol. 49, p. 237) gave a right of renewal (sec. 32) unless there was reasonable ground of objection to the tenant, and further provided that if the landlord and the tenant were unable to agree upon the terms and conditions of the renewal tenancy, either the landlord or the tenant "may apply to the Land Court to fix an equitable rent, or to fix the period for which the tenancy is to be renewed, and the Land Court may thereafter determine the rent to be paid by the tenant, or the period of renewal, or both, as the case may be," and in determining the rent the Land Court "shall, so far as practicable, act on their own knowledge and experience, taking into consideration all the circumstances of the case, holding, and district, including the rent at which the holding has been let, the proposed conditions of the renewed tenancy, the improvements made by the landlord and tenant respectively, and the then condition and value of such improvements; and shall fix as the rent to be paid by the tenant the rent which, in their opinion, would be an equitable rent for the holding between the landlord and the tenant as a willing lessor and a willing lessee."

The equities of tenants in possession, so long established in Great Britain, are recognized in the recent Corn Production Act of 1917, where, in part III, relating to "Restriction on Raising of Agricultural Rents", it is provided that "notwithstanding any agreement to the contrary," the rent payable under any contract of tenancy made or varied after the passing of the act in respect of an agricultural holding, should not exceed "such rent as could have been obtained if Part I of this Act had not been in force, and any question as to whether the rent payable under such a contract is in excess of

the rent permitted by this section or as to the amount of the excess shall be determined by a single arbitrator under and in accordance with the provisions of the Second Schedule to the Agricultural Holdings Act, 1908."

Chapter 97 of the Acts of 1915, 5 and 6 Geo. V, restricted, not only "the Increase of the Rent of Small Dwelling-houses", but "the Increase of the Rate of Interest on, and the Calling in of, Securities on such Dwelling-houses." Section 1, subdivision (3) of this act provides, that—

> "No order for recovery of possession of a dwelling-house to which this Act applies or for the ejectment of a tenant therefrom shall be made so long as the tenant continues to pay rent at the agreed rate as modified by this Act and performs the other conditions of the tenancy, except on the ground that the tenant has committed waste or has been guilty of conduct which is a nuisance or an annoyance to adjoining or neighboring occupiers, or that the premises are reasonably required by the landlord for the occupation of himself or some other person in his employ, or in the employ of some tenant from him, or on some other ground which may be deemed satisfactory by the court making such order, and where such order has been made but not executed before the passing of this Act the court by which the order was made may, if it is of opinion that the order would not have been made if this Act had been in operation at the date of the making of the order, rescind or vary the order in such manner as the court may think fit for the purpose of giving effect to this Act."

Chapter 7 of the Acts of 1919, 9 Geo. V, "extends", "amends" and "prolongs" the duration of the Increase of Rent and Mortgage Interest Act of 1915, and provides that "notwithstanding any agreement to the contrary," if the rent has been increased above the standard provided in the statute it shall be "irrecoverable from the tenant", and "if paid, may be recovered by the tenant".

The long-established custom in this country of giving to the tenant in possession, who is not objectionable and who is willing to continue, a renewal upon fair and equitable terms, is the fundamental basis of the decision in the leading case of *Mitchell* v. *Reed*, 61 N. Y. 123, 135, where Commissioner Dwight in a learned opinion adopts the following statement of the principle from the argument of Sir Francis Hargrave in *Lee* v. *Vernon*:

> "It has long been an established practice to consider those who are in possession of lands under leases for lives or years as having an interest beyond the subsisting term, and this interest is usually termed the tenant right of renewal, which, though, according to language and ideas strictly legal, is not any certain, or even contingent estate, but only a *chance*, there being no means of compelling a renewal, yet is so adverted to in all transactions relative to leasehold property, that it influences the price in sales, and is often an inducement to accept of it in mortgages and settlements. . . . This 'tenant right' of renewal, as it is termed, however imperfect or contingent in its nature, being still a thing of value, ought to be protected by the courts of justice, and when those who are entitled to its incidental advantages, whether by purchase or other derivation, are disappointed of them by fraud, imposition, misrepresentation, or unfair practice of any kind, it is fit and reasonable that this injury should have redress. Accordingly, courts of equity have so far recognized the tenant right of renewal as frequently to interpose in its favor by decreeing that new or *reversionary* leases gained by *means* or *supposition* of the tenant right of renewal, should be for the benefit of the same persons as were interested in the ancient lease, and those who procured such new leases, and were legally possessed of them, should be trustees for that purpose. There is a great variety of authorities on this head, but the cases which have hitherto occurred have been principally of two kinds, some being cases of persons not having any beneficial interest in the old

> lease, as guardians and executors, and others being cases of persons having only partial and limited interests, as tenants for life, mortgagees and mortgagors, and in cases of both descriptions, those who have procured a new lease in such situations have been uniformly declared trustees for the persons beneficially interested in the ancient lease, either wholly or in part, according to the particular circumstances, the court ever presuming that the new lease was obtained by means of a *connection with* and a *reference to* the interest in the ancient one, without in the least regarding whether the persons renewing intended to act as trustees, or for their own emolument."

In "Standards of American Legislation" by Professor Freund, the well-known writer on "Police Power," reference is made to the violation of social obligations as a basis for the exercise of the legislative police power. At p. 108 the English Agricultural Holdings Act of 1906, the Irish Land Acts of 1881 and the Scotch Small Landholders' Act of 1911, which recognize "a right to renewal unless there is reasonable ground of objection to the tenant," are cited by Freund as illustrations of the legislative power to make legal "an obligation [theretofore] amenable to purely social and moral standards," and it is stated that the provisions of these acts "make legally enforceable" an obligation "which is of old standing in social custom." On p. 138, he further states that—

> "The English legislation prohibiting with regard to agricultural holdings unreasonable notices to quit merely legalized existing social restraints and obligations."

It is manifest, therefore, that in giving the preference to the tenant in possession, the Legislature of the State of New York in the September enactments now before the court merely legalized a long standing social custom and restraint evidenced in the English, Irish, Scotch,

Hebrew, Maryland and New York precedents and thereby was enabled to protect its present residents in their homes from competition by non-residents. To say that in giving such a preference the Legislature has acted arbitrarily and without reasonable relation to a legitimate purpose which it is competent for government to effect is to disregard the duty of the State to its residents and to disregard entirely the long history of the relations retween landlords and tenants. In the case of agricultural holdings, occupancy, even of a tenant at will, had been recognized for centuries as something giving to the tenant an equity of renewal. Under modern conditions this equity of renewal has become a commonplace of fair and equitable dealings as between landlords and tenants. No unobjectionable tenant expects that his landlord will rent his premises "over his head" without giving him the first option of renewal. This applies not only to dwellings, but to business places as well, and is recognized as obtaining in New York by the opinion of the Commission of Appeals in *Mitchell* v. *Reed, supra.* When, therefore, the Legislature had to deal with the use of remedial process as an agency of oppression, it could enact into law the tenant's equity of renewal and at the same time restrain the use of ejectment and summary proceedings in violation of such equity. In final analysis, the contention of the landlords is that the New York Legislature should have waited, as English parliaments did, for bloodshed and hatred and rebellion and riot, before meeting a critical rent situation, and should be condemned for its foresight in preserving, as it did, the public peace and the public health and promoting the public welfare.

VII.

THE CLASSIFICATION MADE IN THE STATUTES IS JUSTIFIED BY THE CHARACTER AND EXTENT OF THE EVIL AIMED AT, AND OBVIOUS DIFFERENCES IN SUBJECT MATTER.

The right of the Legislature to classify persons, businesses and things for the purpose of dealing with each class differently is almost unlimited; indeed, the authorities in effect prescribe no limitation upon this power except to forbid its exercise where it is clear that no state of fact is conceivable which can sustain the particular legislative distinction in question. *Wilson* v. *New*, 243 U. S. 332, 354; *Rast* v. *Van Deman & Lewis*, 240 U. S. 342, 357; *Price* v. *Illinois*, 238 U. S. 446, 453; *Miller* v. *Wilson*, 236 U. S. 373, 383-4; *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227; *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 235; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78; *Heath & Milligan Co.* v. *Worst*, 207 U. S. 338, 354; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411; *Budd* v. *New York*, 143 U. S. 517, 548; *People* v. *Havnor*, 149 N. Y. 195, 205. The enactments in suit, however, make no unreasonable distinctions in any aspect.

It is complained that these statutes operate only upon dwelling houses and not upon all rental property. It is, however, certain that if they had related to all real estate they would be earnestly attacked on that ground, for no then existing emergency in New York would have justified the inclusion of other than buildings "occupied for dwelling purposes." But quite obviously no temporary abiding place like a hotel or lodging house, and no place of business like an office or a store, can compare in pub-

lic importance with the home which every one must have; and the Legislature could not ignore this palpable difference. Moreover, it was in respect of homes that the evil aimed at was greatest and most pressing, and the Legislature could, therefore, quite properly first turn its attention to that. "If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied" (*Miller* v. *Wilson*, 236 U. S. 373, 384). Analogous classifications affecting only residential properties have been sustained. *Cusack Co.* v. *Chicago*, 242 U. S. 526, 529; *Welsh* v. *Swasey*, 214 U. S. 91, 106.

Again, the evils of congestion and unrest threatened by rent oppression and profiteering, which these laws seek to remedy, are evils experienced almost entirely in densely populated centres and their environs. Hence, it was in the highest degree appropriate that the statutes in question should be directed only at conditions in cities of a million or more, or cities of the first class, and cities in counties adjoining such large cities, and not be made applicable to small places where the evil did not exist to any substantial extent. Statutes affecting only large cities, and statutes based on differences in population far less reasonable than this, have been repeatedly upheld by the courts and declared not to deny the equal protection of the laws. *People ex rel. Armstrong* v. *Warden*, 183 N. Y. 223, 225; *Tenement House Dept.* v. *Moeschen*, 179 N. Y. 325, 335; *People ex rel. Einsfeld* v. *Murray*, 149 N. Y. 367, 380; *Budd* v. *New York*, 143 U. S. 517, 548; *People* v. *Havnor*, 149 N. Y. 195, 205; *People* v. *Griswold*, 213 N. Y. 92, 96. "A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry

ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. . . . The State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses' " (*Patsone* v. *Pennsylvania*, 232 U. S. 138, 144).

It must be manifest that no one can reasonably complain of the exemption of new buildings from the prohibitions of the statutes in question. This was entirely fitting and proper for the Legislature, and was an attempt to encourage new buildings in the interest of the public and with a view to sooner ending the existing housing shortage. Substantially the same considerations operated in favor of exempting buildings for dwelling purposes in course of construction. These were being erected at very high cost, much larger than the old buildings then standing, and it was impossible legally to compel or even hasten their completion. If the laws in question had been applied to these structures, it was probable that many would not be completed until after the emergency period, and also likely that many would be turned to other purposes than dwellings. To avoid these dangers and to encourage an immediate increase in dwelling structures, which would as soon as completed have to compete with older houses, the exemptions under consideration were quite reasonably included. And as stated above, if unconstructed buildings had been included, the legislation would have invited the criticism that no emergency could possibly exist or tenants' rights need protection so far as such unbuilt dwellings were concerned.

The differences in the classification effected by these laws are, therefore, just and reasonable, and where that is true none may complain that the equality guaranteed in the Fourteenth Amendment has not been observed and respected. The Constitution only requires that those *similarly situated* shall be treated alike, not that *all* shall be subjected to the same regulations. Where the circumstances differ, the laws applicable may also differ. In the case at bar, all within the same class are affected alike by the enactments, and only different classes of persons under different conditions are the subject of appropriate discrimination. All now having tenants in actual possesion of habitation space whom they are threatening with eviction or extortion are treated alike.

It is well settled that a classification may be made based upon degrees of the evil sought to be remedied. *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227. The law may seek to control all the means contributing to an existing evil. On the other hand, it may conclude that, if some of the more powerful means are controlled, it will not be necessary to extend the control to some other means which may, in its judgment, contribute in a lesser degree to the evil. Thus, it has been said:

> "The Legislature is entitled to estimate degrees of evil and to adjust its legislation according to the exigency found to exist" (*Price* v. *Illinois*, 238 U. S. 446, 453).

And again:

> "If a class is deemed to present a conspicuous example of what the Legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law" (*Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160-161).

In sustaining a statute which, in terms, excluded from its operation certain institutions, it was aptly said:

> "The legislation under review was directed at certain evils which had arisen, and the Legislature, considering them and from whence they arose, might have thought or discerned that they could not or would not arise from a greater freedom to the institutions mentioned than to individuals" (*Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 235).

In *Rast* v. *Van Deman & Lewis*, 240 U. S. 342, 357-358, the statute imposed a tax on merchants using trading stamps. The business engaged in by these merchants was the same as that engaged in by other merchants and it was conducted in the same way, with the sole exception that they used trading stamps, which was in the nature of an advertising scheme. This difference alone was held by the court to furnish ample justification for the classification. It was said:

> "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. *Chicago, Burlington & Quincy R. R.* v. *McGuire*, 219 U. S. 549; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 413, 414; *Price* v. *Illinois*, 238 U. S. 446, 452.
>
> "It is the duty and function of the Legislature to discern and correct evils, and by evils we do not mean some definite injury but obstacles to a greater public welfare. *Eubank* v. *Richmond*, 226 U. S. 52, 59. And, we repeat, 'it may make discriminations if founded on distinctions that we can not pronounce unreasonable and purely arbi-

trary.' *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62, and the cases cited above."

These principles amply sustain the distinctions recognized and applied by the Legislature in the acts regulating ejectment and hold-over summary dispossess proceedings (chaps. 942 and 947). Discriminating between a hold-over tenant who is in fact objectionable and one who is not, is too plainly reasonable to warrant discussion. Permitting a natural person to retake possession for his own use while denying this right to a corporate owner, is but recognizing an inherent difference. Only natural persons need homes. And refusing this right to stockholders in such corporations was necessary in order to close an avenue to fraud, as was pointed out at the hearing before the Joint Legislative Committee. Nothing is so easy as to transfer some stock to an individual, and then insist that he is an owner and desires the premises for his own use. That device was very notorious, and it had been much employed to evade the April laws.

The requirement that the owner should be an owner of record was necessitated by similar considerations. Unrecorded conveyances are too well-known as covers for frauds to be overlooked by prudent and competent legislators determined to frustrate evasions of the law. So, also, experience with the April laws had disclosed that alleged purchasers of apartments were frequently the tools employed by designing landlords to defeat the rights of tenants. To assure good faith in this respect, chapter 942 recognized the right of such purchasers only when they were sufficient in number in a particular house to make it highly unlikely that fraud was being practiced.

Refusing to permit the tenant to remain in possession, if he would not or could not pay the rent awarded against him, was certainly not arbitrary (cf. suggestion of Laughlin, J., to the contrary in opinion in *Guttag* case, p. 155). The crisis did not demand any such extreme measure. Tenants were willing and able to pay fair and reasonable rentals. The emergency arose out of the landlords' demands for more. The relative few cases in which tenants were not able to pay rent at all could properly be dealt with by public or private charity and the common law power of the courts to stay writs of possession where necessary in the public interest. There was, it is submitted, nothing either inconsistent or arbitrary in the Legislature refusing to continue in possession tenants who would not or could not pay. Such a provision, on the contrary, would have been inappropriate to the real nature of the emergency and quite unfair to landlords, and would have been attacked as a taking of private property without compensation. Hence the care of the Legislature in all these acts to protect the landlord in his property right to be paid a reasonable compensation for the use of his property and to assure him immediate possession if not paid.

VIII.

No question of impairment of contract obligation is involved in the provisions of chapter 944.

Chapter 136 of the laws of 1920 was enacted April 1, 1920, and it provided in section 1 that "it shall be a defense to an action for rent accruing under an agreement for premises in a city of the first class. . . . that such rent is unjust and unreasonable and that the agreement

under which the same is sought to be recovered is oppressive." This statute was held not to affect leases theretofore entered into (*Paterno Construction Corp.* v. *Katz*, 112 Misc. 242, affirmed, 183 Supp. 954). Quite plainly the terms of the lease made thereafter must be read in the light of the law as it then stood, that is, as subject to "an implied term that the tenant may urge as a defense that the rent reserved is unjust, unreasonable and oppressive." *Paterno Investing Corp* v. *Katz*, 112 Misc. 242, 247. As to leases entered into when this defense already existed, it must necessarily be evident that there can be no color of claim that the obligation of a contract had been impaired; for, as this court has recently again declared in *Munday* v. *Wisconsin Trust Co.*, 252 U. S. 499, 503, "the settled doctrine is that the contract clause [of the Constitution] applies only to legislation *subsequent* in time to the contract alleged to have been impaired."

The defense thus created in and by section 1 of chapter 136 was re-enacted and continued *in haec verba* in section 1 of chapter 944, passed September 27, 1920. This left the contract obligation embraced in a lease made after April 1st but prior to September 27th precisely as it had been before. Manifestly, therefore, there could in this respect also be no impairment of the contract.

But is is argued that an impairment was, nevertheless, accomplished in such cases by virtue of the provision in chapter 944 that (sec. 3)—

> "Where it appears that the rent has been increased over the rent as it existed one year prior to the time of the agreement under which the rent is sought to be recovered, such agreement shall be presumptively unjust, unreasonable and oppressive."

It is clear, however, that this alteration in the rule of evidence can work no unconstitutional impairment of the obligation of a contract. It is only a *prima facie* presumption; and, if the rent is reasonable and the agreement therefor fair, the plaintiff can readily rebut the presumption and establish the fact. No one has any vested right in a rule of evidence, and the Legislature is quite free to alter such rules at will, so long as it does not act arbitrarily. And plainly the presumption in question cannot justly be said to be arbitrary, when it is remembered how widespread and long-continued profiteering in rents has been. In 1919 the shortage in New York was already great and generally known, but no statutes existed restraining landlords from demanding whatever they pleased. It may quite reasonably be assumed that the rents then prevailing were at least adequate; and when more is now demanded, it is not unjust —certainly not unconstitutional—to require the landlord demanding this increase to make the true facts appear, at least in the first instance. *Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U. S. 35, 42; *People* v. *Cannon*, 139 N. Y. 32, 43; *Sackheim* v. *Pigueron*, 215 N. Y. 62, 70.

IX.

CHAPTER 944 IS NOT INVALID BECAUSE IT DOES NOT SPECIFICALLY DEFINE WHAT SHALL CONSTITUTE AN UNREASONABLE RENT AND AN OPPRESSIVE AGREEMENT THEREFOR.

It has been further argued that chapter 944 is void because it does not prescribe any standards by which it shall be determined whether a rental is reasonable or unreasonable and the agreement thereof oppressive or not. Statutes embodying provisions of the same sort have

been repeatedly upheld by the courts, even in criminal cases. Thus, the crime under the Sherman Law is unreasonably and unduly to restrain interstate trade or commerce. Nevertheless, this court has held that even the criminal provisions of the Sherman Law are valid, despite the fact that there is no definition in the act of what constitutes an undue or unreasonable interference with interstate trade or commerce. *Nash* v. *United States*, 229 U. S. 373, 377; see also *Miller* v. *Strahl*, 239 U. S. 426, 434; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 110; *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348; *Arizona Employers' Liability Cases*, 250 U. S. 400, 432; *Weed & Co.* v. *Lockwood*, 266 Fed. 785, 788, *et seq.*; *United States* v. *Roseldum*, 264 Fed. 578, 582; *United States* v. *Oglesby*, 264 Fed. 691, 693-5.

Courts are every day determining what is reasonable; what is a reasonable rent; what is the reasonable value of a commodity; what is reasonable compensation; what is the reasonable amount of force that an individual may lawfully use when assaulted, etc., etc. The common law prescribes no standards in those cases except the judgment of the ordinary prudent man upon all the relevant facts. Laws have never been held unconstitutional which proceed upon such a standard. Indeed, in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327, Congress, in passing a condemnation act, attempted to define or lay down the rule by which the "just compensation" ordained by the Constitution should be measured, but the court said:

> "By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. . . . It does not rest with the public, taking the property, through Congress or the legislature, its representatives, to say what compensation shall be paid, or even what

> shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial question."

No one has ever doubted that this provision of the Constitution for "just compensation" was a sufficient standard; and if it is, it is difficult to perceive why that prescribed in chapter 944 should not be sufficient.

The case of *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, does not at all impinge upon this principle. In that case the statute required that the jury should determine what was the "real value" of an article under conditions which never had existed and probably never could, and which the court could see must necessarily be, not the outcome of reasonable judgment, but of mere speculation by the jury. Such a statute is not before the court. If the failure of chapter 944 to prescribe a standard renders it unconstitutional, then every action for *quantum meruit* and *quantum valebat* is founded upon a theory equally unconstitutional.

Nor is there anything in the objection that the statute invalidates oppressive agreements without defining them. Definition under the circumstances of the case was impossible. The means of coercion and oppression and the forms of it are too numerous for enumeration. Courts of equity and courts of law have invalidated oppressive contracts for centuries, and the constitutional decisions in scores of cases turn upon the question whether a particular provision is or is not oppressive. The courts have never felt embarrassed in deciding these controversies by the absence of any provision specifically and expressly defining the circumstances which shall render a transaction oppressive. Such a statute, if it existed, would undoubtedly overlook and fail to enumerate many plain though novel cases of oppression.

X.

Other alleged unfair and unreasonable provisions of chapter 944.

It has been contended that chapter 944 operated in certain other respects unjustly to landowners, but the contentions were based upon a plain misconstruction and misapplication of the terms of the statute. They may be briefly dealt with as follows:

1. Section 2 of chapter 944 requires the landlord to file a bill of particulars as therein specified. The issue being what is the fair and reasonable rent of the premises in question, it is, of course, proper to inquire as to (1) the investment, (2) the gross income, and (3) the operating expenses. This information the act requires the landlord to furnish in reasonable detail. It was complained, however, that it is not provided that there shall also be set forth the reproduction cost, present value, past losses, etc. But the statute expressly permits the landlord to specify "such other facts as the landlord claims affect his net income from such property", and he may, if he pleases, present upon the trial every fact or special equity which is in any wise relevant to the issue.

Objection was also made to the requirement that there shall be stated "the consideration paid by the landlord for the building." But it has been repeatedly held that the price of a piece of property is some proof of its value (*Triangle Waist Co.* v. *Todd*, 223 N. Y. 27, 31; *Matter of Johnston*, 144 N. Y. 563, 565; *Haugen* v. *Hachemeister*, 114 N. Y. 566, 572-3; *Knickerbocker L. Ins. Co.* v. *Nelson*, 78 N. Y. 137, 144-5; *Hoffman* v. *Conner*, 76 N. Y. 121, 124; *Wells* v. *Kelsey*, 37 N. Y. 143, 146), and the requirement is, therefore, quite proper. Of course, if the price was

paid at too remote a period, the trial court would on the trial in its discretion refuse to take the proof, or instruct the jury to disregard it. But that objection will in fact not be available in one out of twenty cases.

2. Section 6 of chapter 944 requires a tenant who sets up the statutory defense, as a condition precedent, to deposit in court "such sum as equals the amount paid as rent during the preceding month or such as is reserved as the monthly rent in the agreement under which he obtained possession." It was suggested below that if it should require several months for the suit to be reached and tried, the tenant would be able to remain in possession all the while, even though he had deposited only one month's rent. There is, however, no merit in this contention. If the landlord desires, he can, of course, bring a new suit each month, and thus compel the tenant to deposit each month's rent as it accrues.

3. It was argued that the statute prevented the landlord from having the deposits notwithstanding the fact that he had taxes and interest and expenses to pay. But here, too, the contrary is true. The statute expressly provides that the deposit may be "disposed of as justice requires" (sec. 6), and the practice in the Municipal Courts of the City of New York is now well settled that such deposits will be paid over to the landlord without prejudice on his application, unless special circumstances require a different disposition. *Mofanthe Realty Co., Inc.* v. *Cohen*, 113 Misc. 391, per Robitzek, J., where the practice is considered and explained.

4. A further objection was made upon the ground that the statute does not compel the tenant to remain for a definite term, and that, therefore, he may quit at the end of any month. Of course, if the landlord seeks no more

than the old rent, he may treat the tenant as having renewed his term and thus bind him for a year if formerly a yearly tenant. *Stevens* v. *City of New York*, 111 App. Div. 362, 363. The contention, however, disregards entirely the practical situation to which this legislation was directed. As matter of actual fact, the tenant must remain where he is—the shortage leaves him nowhere to go. He is, therefore, in truth, as much bound as his landlord. If the statute had fixed a definite term, it is not open to doubt that that would at once have been assigned as a ground for challenging the act. Indeed, it is difficult to reconcile this objection with the continuous and persistent demands for possession. No tenant before the court has refused to execute a renewal lease binding him for two years, and, of course, tenants in most, if not in all, cases are willing and anxious to have the security of a fixed term at a fixed rental. Surely, it will be time enough for a landlord to complain on this ground of a lack of mutuality when he shows that the improbable has happened, namely, that an existing tenant has refused to make a definite renewal lease for the two years on reasonable terms of rental.

XI.

FUNDAMENTAL ERRORS IN THE OPINIONS OF THE APPELLATE DIVISION FOR THE FIRST JUDICIAL DEPARTMENT.

The court below sustained as valid all the acts of the Legislature herein in suit. But the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department held chapter 947, which regulates and restricts the action of ejectment, to be invalid. This latter ruling was duly appealed from to the

Court of Appeals of the State, and is now pending under advisement in that court. A brief review of the opinion delivered at the Appellate Division may be interesting.

Having sustained as valid chapter 944 prohibiting unreasonable rentals provided for in oppressive agreements, the Appellate Division for the First Judicial Department declared unconstitutional chapter 947 which temporarily suspended the remedy of ejectment during the probable duration of the emergency. That learned court regarded the latter statute as *unnecessary* to meet the emergency, and therefore deemed it arbitrary and oppressive and as such unconstitutional. The court apparently thought that chapter 944 provided all the protection requisite to avert the emergency, and in effect substituted its judgment for that of the Legislature. Therein it plainly erred—making not only a serious mistake of fact in respect of the necessities of the situation, and overlooking what experience had proved to be indispensable, but also a fundamental error of law in usurping a part of the exclusive right of the Legislature to determine matters of legislative policy and discretion and the character of appropriate measures to deal with an ascertained evil. The inducing cause of the ruling of the Appellate Division in the *Guttag* case appears from the following extract from its opinion in *Levy Leasing Co.* v. *Siegel* (opinions, pp. 144-6):

> "It [the Legislature] did, I think exercise great foresight in framing the statute in question for, if it be sustained as constitutional, it will in its practical operation remedy, if not fully, practically every evil that it was anticipated would follow if the execution of the laws as they theretofore existed were permitted. It is manifest that the legislation was designed to avert the crisis incident to the shortage of housing accommodations that might have been brought on if hun-

dreds of thousands of the inhabitants of this great metropolis were evicted and unable to find living accommodations and also to prevent profiteering landlords from taking advantage of the emergency, which left their business of leasing their property for such uses substantially without competition and left them in a position where they could exact unreasonable and unconscionable and extortionate rentals for the use of their property, while they were protected by the usury laws from having to pay more than six per cent. on any loan of money that they had obtained or might obtain on the security of their premises. *By restricting landlords to making contracts for reasonable rentals during the period of the emergency, the Legislature left nothing to be accomplished by the substitution of one tenant for another who was evicted, for all agreements for rentals thereafter made whether with tenants in possession or with new tenants were required to be reasonable.* Assuming without now deciding, that the other laws enacted at the same time, which were designed to prevent the wholesale eviction of tenants, were unconstitutional and that the landlords were at liberty to evict at the expiration of the term or to recover possession by electing to terminate the tenancy for a failure to pay the rentals agreed to be paid—*there was left to the landlords no incentive to carry out their threats of wholesale evictions, provided the statute now under consideration was sustained as constitutional;* and, therefore, even on the assumption stated, the evictions would be reduced to a minimum."

There are, however, several mistaken assumptions in this passage. The assumption that chapter 944 authorizes the courts to revise the rentals in *all* agreements is plainly not correct. The defense provided for is, not only that the "rent is unjust and unreasonable", but also "that the agreement under which the same is sought to be recovered is oppressive". An agreement whereby a tenant in possession is made to pay an unreasonable rent under

a threat of eviction if he refuse, is oppressive; but an agreement for the same rent with a new tenant who is a non-resident, for example, and has a suitable place to live elsewhere and is under no compulsion to come to New York, is not oppressive and has not been induced by any form of coercion. Many other cases exist in which unreasonable rents may be charged because the rental agreements are not oppressive. None of these, however, comes within the purview of chapter 944. There is, therefore, still a large degree of incentive for landlords to evict the present tenant in order to obtain an unreasonable rent from his successor as a new tenant who could not prove oppression and hence could not avail of the defense.

But quite aside from the nature of the defense provided for in chapter 944, the view of the Appellate Division is contradicted by the experience of many peoples in many lands and during many different periods of history, as we have seen, and by practical experience in the City of New York itself under the laws enacted in April, 1920. It has never been sufficient to forbid unreasonable rentals without at the same time protecting the tenant in possession against eviction if ready to pay a just rental. A law which provides for a reasonable rent but does not forbid dispossession of a tenant willing to pay such rent is, in practical effect, a dead letter during a period of housing shortage. Patently, a tenant with no place to remove to must pay what the landlord demands or lose his shelter. Even if it were true that the landlord could obtain no more than a reasonable rent from the new tenant, nevertheless, the old tenant could not safely refuse to pay more, with the dire threat of eviction and homelessness hanging over his head. With no place in the

City of New York or the vicinity to remove to, eviction might mean in innumerable cases the loss of one's livelihood as well as one's home, because the new home may be obtainable only at too great a distance from the tenant's place of employment in the City of New York. Hence, so long as the landlord had the right to evict at will, laws like chapter 944 made no difference to him. He could evict an existing tenant at will by an action of ejectment, and then rent to a new tenant who could not plead that his agreement for rent was oppressive.

That was plainly revealed after the April, 1920, laws went into effect. Chapter 136 then provided for precisely the same defense as is now contained in chapter 944. Nevertheless, it did not reduce profiteering in rents to any substantial extent. Hold-over summary dispossess proceedings could then still be brought, and the courts were at once overcrowded with them. Ejectment was not then so much resorted to only because summary proceedings were available and more expeditious. If a tenant refused to pay an unreasonable rent, the landlord immediately served him with notice to quit, and thus put him in peril of losing his home. Innumerable tenants were thus coerced into paying extortionate rents. The effectiveness of this threat of eviction as a means of compelling the acceptance of oppressive terms, was fully appreciated by landlords for, as the Governor certified to the Legislature, approximately 100,000 of such notices to quit on October 1, 1920, had already been served before the Governor prepared and sent his message on September 20th. The purpose which lurked behind these notices was not simply to obtain possession and nothing else. As the Governor said in his message of September 20, 1920 (pp. 2, 3):

> "Our temporary laws of last spring [and this included chapter 136 which dealt with unreasonable rents] have fallen far short of what was expected of them and selfishness and greed on the part of not a few landlords has brought about an indescribable condition in the Municipal Courts in New York City. . . . The court rooms have been crowded beyond their capacity by tenants seeking relief. . . . The people, to some degree at least, have managed to protect themselves from other forms of profiteering, but they are helpless to deal with this one, because a home every one must have. . . . Inasmuch as the evidence laid before us indicates that summary proceedings are being grievously abused, in a crisis of this kind, the State does only its duty when it withdraws or modifies them."

Manifestly, chapter 136, which contained the identical defense now embodied in chapter 944, did not "in its practical operation, remedy . . . practically every evil that it was anticipated would follow if the execution of the laws as they theretofore existed were permitted", nor did it in actual practice remove the incentive to evict the old tenant in order to make room for a better paying new tenant. In short, it failed during the five months it was thus in operation to accomplish the results which the Appellate Division in the extract quoted prophesies would attend the operation and enforcement of chapter 944.

The experience immediately following the passage of the September laws is also enlightening upon this score. No sooner were they enacted than a large number of suits in equity were commenced for mandatory injunctions ordering the defendant tenants to remove forthwith. The theory of those suits was that equity should afford this remedy since there was no longer any remedy at law, the remedies both by ejectment and hold-over

summary proceedings having been validly suspended. In the pamphlet of opinions submitted herewith, the court will find four opinions in cases of this description (*Wm. Brandt & Co.* v. *Weil*, p. 7; *Sperling* v. *Barton*, p. 17; *Versailles Holding Corpn.* v. *Stein*, p. 19; *Burke* v. *Hurlburt*, p. 114), and there were many others. This effort was made to subvert the policy of the September laws obviously because it was realized by landlords that the September laws had taken away their principal means of accomplishing their purposes.

It is submitted that to accomplish any practical result in protecting tenants and curbing extortion in rents, it was indispensable to suspend the power to evict by means of ejectment. Doubly necessary was such a prohibition if the State was to afford protection to "residents of the State whose welfare," it was conceded by the Appellate Division "is its especial concern," and not permit them to be rendered homeless because landlords desired to let "to the highest bidder, [and thus] accommodate non-residents perhaps to the exclusion of citizens of this State" (*Levy Leasing Co.* v. *Siegel*, opinions, pp. 139, 144). It certainly was not arbitrary for the Legislature to promote the foregoing views; and, if that be true, then however much others may be persuaded that wisdom and expediency point to different expedients, the act of the Legislature cannot be invalidated as an unlawful exercise of the police power.

But it has been suggested that it was, nevertheless, arbitrary temporarily to suspend the remedy of ejectment because the courts always have power to stay or enjoin the issuance of writs of possession in cases where the public interest requires, and that idea is strongly urged in the opinion of the Appellate Division in the

Guttag case. Here, again, the practical necessities of the case and the experience under the April laws are entirely overlooked or disregarded. But let us briefly examine the probable operation of such a stay system.

By far the greatest part of the population of the City of New York lives in rented homes or apartments. The vast majority of the terms of leases have either already expired or will expire within the next eight months. There are thus ready at hand the materials for at least several hundred thousand ejectment suits. We have seen that in September alone there were 100,000 notices to quit outstanding. There would then be the following business to be promptly attended to by the Justices of the Supreme Court in the City of New York:

(1) Thousands of ejectment cases to be tried and decided or disposed of on default;

(2) Thousands of motions for stays to be heard and decided upon proofs;

(3) Thousands of motions to vacate stays theretofore granted, and

(4) Thousands of motions to extend and renew such stays from time to time.

The calendars of the Supreme Court in the City of New York are already overcrowded, and no ordinary business could be transacted in this, perhaps the most important part of the court in the State, if the suggestion made by the Appellate Division were approved by this court.

Nor is this by any means the only detrimental consequence involved in this suggested discretionary stay system. Such stays would naturally not be granted as matter of course; they would rest in the discretion of the court. What then would a tenant have to do to secure

a stay? Nearly fifty different Justices of the Supreme Court in the City of New York would answer that question in many different ways. One would require proof of a diligent search for other quarters only in the neighborhood in which the tenant lived; another in the borough; a third in the City of New York at large; a fourth even in New Jersey and Connecticut. One would require a tenant to move if he could find other premises at any price; another only if he could afford to take the new quarters. One justice would grant long stays; another only short stays. Chaos would be the inevitable outcome of so much and so widely distributed and dangerous discretionary power. This was as matter of fact the experience under chapter 137 enacted in April, 1920, which provided for discretionary stays.

But the worst consequence of all still remains to be mentioned. Under this system thousands and thousands of tenants would be constantly searching everywhere for apartments. The law would thus make every tenant in the city an urgent competitor of every other. The demand for habitation space that did not exist and could not be had would thus be inordinately increased, and by virtue of this artificial inflation of the demand, prices made more and more exorbitant. It should be too plain for argument that under such circumstances stability would be rendered utterly impossible.

Finally, it may well be inquired, what tenant would dare resist extortionate demands, when knowing that his landlord could put him to all this worry and trouble and expense, and, in addition, place his home in continual uncertainty and jeopardy? The fear of the costs in the ejectment suit, the lawyer's fees in connection therewith and in relation to the applications for stays and the

extensions thereof, the expenses of the search for other quarters and the loss of time involved, even without "the harassing uncertainty and the misery caused by the constant repetition of these proceedings," to which the Governor referred in his message, would alone be more than sufficient to coerce the vast majority of tenants. The stay system, it must surely be clear, would be an oppressive weapon in the hands of the profiteering landlord.

But we are not left to speculation as to the consequences to be apprehended from such a method of dealing with the problem. The City of New York endured the afflictions of a discretionary stay system for nearly six months—from April 1st to September 27, 1920. Chapter 137 of the laws of 1920, enacted in April, provided for just such a system as the Appellate Division of the First Department thought preferable. It was an utter failure so far as the public interest was concerned, but a boon to the extortionate landlord. It was one of the laws concerning the practical working of which the Governor certified in his message to the Legislature as above quoted (p. 116). And it should be borne in mind that the message of the Governor was written after both chapter 136, which forbade unreasonable rents, and chapter 137, which provided for a stay system, had been in force and effect nearly six months.

The Joint Legislative Committee reporting to the Legislature on September 20, 1920, after one of the most thorough investigations ever made in respect of any legislation in the State of New York, stated the following conclusions (p. 6):

> "The attempts of some landlords to obtain more rent by taking tenants to court month after month and the granting of short stays from time to time subject families to great anxiety. They

> know not when they may have to move, have no place to go, lose respect for the laws and the courts, who to them seem unable to protect their rights. They readily fall victims to the agitator."

It is, therefore, submitted that it was entirely reasonable and proper for the Legislature temporarily to suspend the remedy of ejectment for a definite period during the emergency, and to decline to permit the situation to remain as it would have been if the right to enforce that remedy had continued limited only by the power of the courts to stay the issuance of writs of eviction in their discretion. Manifestly, it was not arbitrary for the Legislature to refuse to permit as to the Supreme Court and the action of ejectment, a stay system which had in practice proved so unsuccessful in the Municipal Courts in hold-over summary proceedings. Were it even possible to have well-founded conflicting opinions upon that score, it would, nevertheless, constitute a due and proper exercise of the police power, for it is well-established law that the Legislature is entitled to its own views on debatable subjects and that the courts may not interfere merely because they differ with it upon such an issue. *Chicago, B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549, 569; *Armour & Co.* v. *North Dakota*, 240 U. S. 510, 513; *People* v. *Griswold*, 213 N. Y. 92, 96-7.

Despite the fact that in the *Levy Leasing Co.* case the Appellate Division had recognized the scrupulous fairness to landlords of the provisions for compensation contained in chapter 944, it was, nevertheless, asserted in the *Guttag* case that (opinions, pp. 153, 164):

> "If [the landlord] pursued the latter remedy [that is, sued for use and occupation] he could at most only obtain a money judgment enforceable by a property execution, which in many cases would be of little value", and that "the statute

> transfers without making any provision for compensation the use of the property of the landlords to the tenants."

(See also p. 158.) With all deference, it is submitted that these statements must have been inadvertent. Chapter 944 regulates both actions for rent and rental value. In both it requires a deposit by the tenant before he may even litigate the issue of the reasonableness of the amount sued for (sec. 6). If the action is for use and occupation, that is, rental value, the tenant must deposit "such sum as equals the amount paid as rent during the preceding month", and if the action is for rent, then the deposit must equal the sum "reserved as monthly rent in the agreement" (*id.*). And in both cases it is provided that (*id.*):

> "Where a judgment is rendered for the plaintiff it shall contain a provision that if the same be not fully satisfied from the deposit or otherwise within five days after the entry, and service on the defendant of a copy thereof, the plaintiff shall be entitled to the premises described in the complaint and a direction that a warrant shall issue commanding the sheriff, marshal or other officer charged by law with the duty of executing judgments to remove all persons therefrom."

Quite plainly, therefore, a landlord suing for rental value would not, as the Appellate Division erroneously intimated, be limited to the recovery of a money judgment alone, but, on the contrary, would have the right to a warrant of dispossession as well, if the tenant did not promptly pay the judgment in full, and, in addition, the plaintiff would at all times have the benefit of security deposited in court for either all or nearly all of his claim. Section 5 of chapter 944 further provides for a warrant of dispossession, as well as for a money judgment, where "in an action . . . for the rental value of the use or oc-

cupation . . . the plaintiff recovers judgment by default" and the judgment is not satisfied in five days. These are remedies which are much more efficient than landlords had available for similar purposes heretofore.

Nor is it true that the laws before the court provide no compensation for the tenant's use of the property. If the landlord so elects, he may regard the tenant as having renewed his prior lease, and can then hold the tenant for the old rent. *Stevens* v. *City of New York*, 111 App. Div. 362, 363. In that case he may sue for rent under chapter 944 or bring summary proceedings under chapter 945. If he desires more, he can sue either for rent where there is a new lease, or for rental value where there is none. In both cases he will under chapter 944 have the right to require a deposit in court and be entitled to both an execution and a warrant of dispossession if he recover judgment.

It is difficult to reconcile the passage from the opinion in the *Gattag* case quoted above with the criticism of the Appellate Division that the Legislature "has not adopted means appropriate to the end" because it did not confer the benefit of these laws on a tenant who would not or could not pay the reasonable worth of the premises, and thus, it is asserted, the Legislature has made "inconsistent determinations with respect" to the emergency. The opinion of the Appellate Division should speak for itself (opinions, p. 155):

> "If the tenant does not pay, the public morals, health and safety are deemed not to be endangered by his removal without regard to whether or not he and his family may find other shelter. In authorizing the removals in those instances, the effect of any legislative determination that it would be impossible for evicted tenants to find other accommodations, to be found in this or the other statutes

> enacted at the same time, is destroyed, for surely it was not within the province of the Legislature to peer into the future and decide that if a tenant should fail to pay rent at the rate for which he was liable during the preceding month or a reasonable rental determined by the court or jury, the public welfare would not be endangered or affected by his eviction but that in all other cases, the public morals, health, and safety would be so endangered by the eviction of a tenant wrongfully holding over, who, in the eye of the law, is a trespasser,—that it was necessary for the public welfare that he should not be evicted even though the owner desired to discontinue leasing his property and desired possession thereof to use it for any lawful purpose or not to use it at all."

This passage shows that the learned justice wholly misconceived the emergency with which the Legislature was concerned. The crisis had arisen because tenants would not or could not pay exorbitant rents. But they were, however, with inconsequential exceptions, willing and able to pay reasonable rentals; they were not asking charity but freedom from extortion and oppression. To meet this kind of an emergency, the Legislature acted. With the comparatively rare case in which the tenant could not or would not pay rent at all, or could not or would not pay the reasonable rent, these laws did not deal one way or the other. The number of such cases was small, and the law as it existed was adequate properly to dispose of them. Wherever there were special facts in such cases which involved the public morals, health and safety, the courts always had had power to relieve by staying the issuance of the writ of possession (see opinion in *Guttag* case, pp. 158-9). The laws in suit did not take this power away from the courts; on the contrary, they left it wholly unimpaired, and, consequently, those rare and exceptional cases were thus provided for. There

was, therefore, no inconsistency in the action of the Legislature in this regard. It did not find that as to such tenants there was or would be no want of shelter; it merely left this special class to be dealt with as the circumstances might require. That course was safe in this connection, for there was obviously no danger of overcrowding the courts with such cases. It was quite proper to leave them subject to the judicial power to stay, which, as we have seen, was and had been proved an utterly impracticable remedy in the cases with which the laws in suit were practically concerned.

Moreover, it would be going very far to hold that chapter 947 was unconstitutional because, for the sake of logical consistency, it did not provide that tenants who did not pay any rent at all should, nevertheless, be allowed to occupy the landlord's premises! Yet that is exactly what the reasoning of the learned Appellate Division imports.

It was further objected by the Appellate Division, and declared to be a "fundamental objection," that "the Legislature has [in and by chapter 947] assumed to determine not merely facts existing in the past and at the time of the enactment of the statute, which concededly was within its province, but the facts as they may exist from day to day throughout the period during which the owners are deprived of the possession of their property" (*Guttag* opinion, p. 155). We have already considered in point III the reasonableness of the period selected by the Legislature and shown that it was conservatively and carefully estimated and based upon sufficient evidence (*supra*, pp. 36-42).

If it was intended in the extract quoted, and in other similar expressions in the opinion in the *Guttag* case, to

intimate that the Legislature has no *power* to determine the probable future duration of conditions which call for legislation in order to fix the period during which such legislation shall remain in force, then it is submitted that that doctrine is plainly unsound and untenable. Laws are always made for the future; and the Legislature is, therefore, in each instance required to say at the moment of enactment how long they shall last. It is true that the Legislature is not bound thereby, and may always repeal a statute; and it is true that in many cases no express time limit is provided, but the question, How long shall the proposed act be the law? is always before it and proper for it to decide. The Legislature is thus under the necessity of making findings of precisely the nature to which the Appellate Division objected, and its action in this regard is necessarily constitutional, so long as such findings are not arbitrary.

The objection that "the Legislature has assumed to decide in advance that at no time during the period . . . may a tenant be removed without endangering the public health, safety and order" (*Guttag* opinion, pp. 156-7) is, in the end, but a dissent from the exercise of the legislative discretion in the choice of means. If sound, it would nullify every self-executing stay law, even the stay laws which provide that process shall not run against soldiers during the term of their enlistment, since it may always be true that there is some soldier who is able adequately to defend his case even though absent, because his representatives at home have exclusive knowledge of the facts and ability duly to protect his interests. *Breitenbach* v. *Bush*, 44 Pa. St. 313, 318, 319; *Edmonson* v. *Ferguson*, 11 Mo. 344, 346. It was for the Legislature, having to deal with the emergency, to select

the means. It could have provided a discretionary stay system, thus adapting the relief to the peculiar circumstances of each case, as it had previously attempted to do in and by chapter 137. But as we have seen, that method had proved a failure and a means of over-crowding the courts as well as an instrument of oppression and extortion. The Legislature, therefore, wisely determined not to continue that method. If, in so doing, it granted an occasional tenant relief who was not in fact entitled thereto, that circumstance is not material. That is but the objection which may be made to any law. So long, however, as this law appropriately and duly served the greatest good of the greatest number, which cannot be reasonably denied, it is constitutionally unobjectionable.

Nor is there any merit in the contention, adopted by the Appellate Division, that chapter 947, is unconstitutional because "it was the final enactment of the Legislature culminating in the removal of every remedy . . . of an owner for the recovery of the possession of real property occupied by tenants whose terms had expired" (*Guttag* opinion, p. 159). The right of a landlord to any remedy is at most a contract or property right, and as we have seen (point V, *supra*), it has been repeatedly held that such rights must yield to the reasonable demands of the public welfare. Where, therefore, it appears that unrestrained recourse to a remedy is inimical to the public welfare—as it is patent is true in the case at bar—the Legislature may impose any reasonable restraint necessary to meet the situation. And that is all that was done in the enactments herein in question, which temporarily suspend the objectionable and oppressive remedies.

It is immaterial, therefore, to refer to such authorities as *Green* v. *Biddle*, 8 Wheat. 1, which hold that it is ordinarily improper to withdraw or suspend all substantial remedies available to a party. That is concededly a long settled principle of constitutional law. But we are not here concerned with such a case. The withdrawal or suspension in question was called for because there was a public crisis that imperatively demanded intervention of the police power of the State and made appropriate and reasonably necessary the legislation in question. Where that is true, as a long line of authoritative decisions proclaims, neither rights of property nor rights of contract fetter the power of the State to do and accomplish the needful. *Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U. S. 372, 375-7; *Manigault* v. *Springs*, 199 U. S. 473, 480; and see cases cited under point V.

XII.

CHAPTER 947 DID NOT IMPAIR ANY CONTRACT OR PROPERTY RIGHT.

It was clearly recognized by the Appellate Division in the *Guttag* case that (opinions, pp. 158-9)—

> "It is settled law that the court has full control over writs of possession and may stay or enjoin the issuance thereof whenever the circumstances require that to be done, and that one of the grounds on which this jurisdiction is exercised is that an 'oppressive use' of the writ is threatened or is being made (*Jackson* v. *Stiles*, 3 Wend. 429; *Knox* v. *McDonald*, 25 Hun 268; *Granger* v. *Craig*, 85 N. Y. 619; *Cornell* v. *Dakin*, 38 N. Y. 253; *Chadwick* v. *Sprague*, 1 N. Y. Civ. Proc. Rep. 422; *Rumsey* v. *Otis*, 133 Mo. 85; *Hay* v. *Valley Pike Co.*, 38 Pa. Sup. Ct. 145; 15 Cyc. 189; 17 Cyc. 1135; Newell on Ejectment, 816; Warvelle on Ejectment, 520;

Freeman on Execution, §37). Not only has the court authority to stay the execution of its final judgments and writs, but where the process is abused, as by evicting a person who is ill, it affords a remedy by way of damages (*Preiser* v. *Wyland*, 48 App. Div. 569; *Bradshaw* v. *Frazer* (Ia.), 85 N. W. Rep. 752; see also *Herter* v. *Mullen*, 159 N. Y. 28). I do not question the power of the Legislature to legislate on this subject as by forbidding the eviction of a person who is ill or who is suffering from a contagious disease by which the public health may be endangered, and to alter and regulate the jurisdiction and proceedings in law and equity conferred upon it by Article VI, Section three, of the Constitution, or to provide that during such emergency writs of possession should not issue where it is shown that the execution thereof would endanger public health, morals, safety, or order, owing to the fact that there were no available housing accommodations for the persons evicted. That would be merely a regulation of the power already vested in and possessed by the court, which, however, it could and would exercise without any such attempted regulation."

It follows, therefore, that all leases upon property in New York must be read in the light of this settled rule of law and their terms and provisions be deemed qualified accordingly. The contract and property right of the landlord was, consequently, at all times subject to the power of the court to stay the issuance of writs of possession during emergency and in order to prevent oppression. Certainly, if the courts had this power to stay the issuance of writs of possession and thus, in effect, extend the terms of leases, it would not be an unconstitutional impairment of contract or an unconstitutional taking of property for the Legislature to enact expressly what was theretofore to be implied in substance. The courts are as much bound by these constitutional prohibitions as the Legislature; indeed, these prohibitions are

expressly directed by the Constitution against the *States*, and therefore "extend to all acts of the State, whether through its legislative, its executive, or its judicial authorities" (*Scott* v. *McNeal*, 154 U. S. 34, 45; see also *Chicago, Burlington &c. Rd.* v. *Chicago*, 166 U. S. 226, 233-4, and *Muhlker* v. *Harlem Railroad Co.*, 197 U. S. 544). It is impossible to perceive how any constitutionally protected contract or property right can then be unlawfully invaded when the Legislature, after due investigation, determines that the requisite emergency exists, and thereupon directs the stay in the public interest, and does but what the parties, in legal contemplation, must be deemed to have known from the outset might and could be done in such circumstances by the courts. The legislation in ultimate effect but declares that a stay shall be granted during the probable period of the emergency.

XIII.

THE LANDLORD BEFORE THE COURT MAY NOT BE HEARD TO COMPLAIN THAT CHAPTER 947 IS UNCONSTITUTIONAL AS IMPROPERLY INTERFERING WITH THE RIGHTS OF DEVISEES, GRANTEES AND OTHERS.

It has been further suggested that chapter 947, which regulates the action of ejectment, is unconstitutional because it forbids the use of this remedy, not only in cases between landlords and tenants, but in controversies between others, as, for example, between devisees or grantees and the heir who disputes their title, etc. Assuming, *arguendo*, that this construction of chapter 947 is allowable, it is well-settled law that the landlord before the court may not be heard upon that score, since it is not a member of the class thus wrongfully affected by the

statute, and hence is not aggrieved thereby. *Arizona Employers' Liability Cases*, 250 U. S. 400, 429; *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 156-7; *Hawkins* v. *Bleakly*, 243 U. S. 210, 214; *Rail Coal Co.* v. *Ohio Industrial Comm.*, 236 U. S. 338, 349; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544-5; *People ex rel. Doscher* v. *Sisson*, 222 N. Y. 387, 396.

In *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544, this court declared as follows:

> "We may once more repeat, what has been so often said, that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutional feature injures him, and so operates as to deprive him of rights protected by the Federal Constitution. *Southern Railway Co.* v. *King*, 217 U. S. 524, 534; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550; *Rosenthal* v. *New York*, 226 U. S. 260, 271."

And in *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576, it strongly reiterated this well established doctrine, saying:

> "The stress of the present argument, in the brief and at the bar, is upon the feature of the law which takes away the defense of contributory negligence from establishments employing five or more and still permits it to those concerns which employ less than five. Much of the argument is based upon the supposed wrongs to the employé, and the alleged injustice and arbitrary character of the legislation here involved as it concerns him alone, contrasting an employé in a shop with five employés with those having less. No employé is complaining of this act in this case. The argument based upon such discrimination, so far as it affects employés by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the consti-

tutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. *Southern Railway* v. *King*, 217 U. S. 524, 534; *Engel* v. *O'Malley*, 219 U. S. 128, 135; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550; *Yazoo & Mississippi Valley R. R.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219; *Rosenthal* v. *New York*, 226 U. S. 260, 271; *Darnell* v. *Indiana*, 226 U. S. 390, 398; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544; *Missouri, Kansas & Texas Ry.* v. *Cade*, 233 U. S. 642, 648."

It is, moreover, in the highest degree doubtful whether chapter 947 is open to any such construction as has been attempted. No one denies that the Legislature had in mind only cases arising between landlords and tenants; and in view of the well-settled rules that the court must, if possible, carry out the legislative intent (*People ex rel. Savings Bk.* v. *Butler*, 147 N. Y. 164, 167, 169; *People ex rel. Wood* v. *Lacombe*, 99 N. Y. 43, 49), must adopt a construction which renders an act constitutional in preference to one which renders it invalid (*People ex rel. Simpson* v. *Wells*, 181 N. Y. 252, 257; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 546), must construe it in relation to its object and purpose and *in pari materia* with the other enactments passed at the same time and with the same purpose (*People ex rel. Savings Bk.* v. *Butler*, 147 N. Y. 164, 168, 169; *People* v. *Potter*, 42 How. Pr. 260, 261-2, 270, affirmed 47 N. Y. 375; *Smith* v. *People*, 47 N. Y. 330, 339), and may take into account the legislative reports made in relation to it (*Caminetti* v. *United States*, 242 U. S. 470, 490; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310, 318; *Famborille* v. *Atlantic, etc. Co.*, 155 App. Div. 833, 840, affirmed 213 N. Y. 666), it should be too clear to require argument that no court hereafter having to deal with this question of construction will be under any necessity to place upon the en-

actment the interpretation suggested. Even if it did, however, and the act were thus declared invalid as against devisees, grantees, etc., it does not at all follow that the act would be void as to landlords and tenants. Many statutes are unconstitutional as to one class of persons or transactions and yet entirely constitutional as to others. See *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147, holding the Workmen's Compensation Act void as to employees engaged in interstate commerce, but leaving it in undisturbed operation in respect of workmen engaged in intrastate business.

XIV.

CHAPTER 947 IS NOT AN UNCONSTITUTIONAL INTERFERENCE WITH THE JURISDICTION OF THE SUPREME COURT OF THE STATE OF NEW YORK.

It has been contended in some of the cases involving chapter 947 that it is unconstitutional because in a limited class of cases (*i. e.*, hold-over cases on termination of leases), it suspends the remedy in ejectment for the period of two years and thereby, it is alleged, impairs *pro tanto* the full jurisdiction of the Supreme Court of the State of New York in violation of section 1 of article VI of the Constitution of the State of New York, which provides that—

> "The Supreme Court is continued with general jurisdiction in law and equity."

A clear appreciation of the far-reaching consequences of upholding this contention may be helpful to a realization of its unsoundness. In substance and effect it means that no exercise of legislative power, however necessary to preserve the public health, morals, good order, safety

and welfare, is legally possible without an amendment to the constitution of the State, if it in any wise involves a suspension or destruction of any existing remedy—no matter how obnoxious to the public interest that remedy may have become. Plainly, the language of the state constitution, which is quoted above, does not expressly declare any such extraordinary principle of limitation on governmental and legislative power. It must, therefore, be gathered from alleged implications of the constitution, or not at all. But any such implication manifestly conflicts with the express terms of section 16 of article I of the state constitution which, while it continues as the law of the State the prëexisting common and statutory laws, does so only with the qualification that they "shall be and continue the law of this State, subject to such alterations as the Legislature shall make concerning the same." To hold that the provision of article VI of the state constitution, above quoted, prevents the Legislature in the legitimate exercise of its police power from suspending or abridging a remedy of which the state Supreme Court previously had jurisdiction, would be to nullify a power expressly conferred on the Legislature by article I because of an alleged implication arising from article VI. That there is no such implication is apparent from the following language of the Court of Appeals in the *Matter of Stilwell*, 139 N. Y. 337, 342:

> "The general jurisdiction conferred upon the Supreme Court by the Constitution does not operate to prevent the legislature . . . from changing the common law, or from regulating and altering the jurisdiction and proceedings in law and equity in the same manner and to the same extent as had been exercised by it before the Constitution of 1846 was adopted."

The principle contended for would invalidate some of the most firmly established statutes in the State. Thus, section 15 of the New York General Corporation Law provides that—

> "No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate" [*i. e.*, a certificate authorizing it to do business in the State].

Obviously, the state Supreme Court had jurisdiction of suits by such unlicensed foreign corporations upon contracts thus made by them prior to the enactment of this law; and, equally obviously, a part of its "jurisdiction" (*i. e.*, its power to hear and determine) was wiped out thereby. Yet no one has ever even suggested a challenge of this enactment upon any such ground.

Every statute which has been passed in the State of New York since the adoption of the constitutional provision now embodied in section 1 of article VI of the present state constitution, and which makes illegal an act or transaction theretofore valid, is also open to the charge of invalidity, since the ineluctable outcome of such statutes is to close the state Supreme Court to suitors who might previously have brought suit there upon claims now barred for illegality. Nevertheless, innumerable acts of this sort are every day enforced in the New York courts and many have been distinctly held valid. (*Stern* v. *Metropolitan Life Ins. Co.*, 169 App. Div. 217, affirmed 217 N. Y. 626; sec. 91, Ins. Law; sec. 1192, Penal Law.)

It is no answer to this contention to point out that such statutes merely create a defense, and do not forbid the suits to be brought. Even if that be true (and it fre-

quently is not), these enactments certainly forbid the suits to be maintained. However, even if there were any merit in this suggestion, it merely makes this constitutional contention in the case at bar turn upon the particular form of expression which the Legislature chances to employ. Thus, it would be valid for the Legislature to declare that certain facts should constitute a defense to an action; while it could not declare in the same collocation of circumstances that a particular form of action should not be maintainable. Obviously, such a distinction amounts to nothing in substance. In the case at bar, the statute would have met the objection, and yet have had precisely the same practical effect, if it had provided that it should be a defense to an action of ejectment brought by a landlord against a tenant that the tenant was not in fact objectionable, that the landlord did not desire the premises for his own use, etc. If this were necessary, the court, whose duty it is to construe the act so as to leave it constitutional (*Matter of Watson*, 226 N. Y. 384, 404), must construe it as if this formula had been actually used, particularly since to do so is to work no alteration in the substance of the enactment. The courts, particularly in constitutional cases, deal with the substance and not merely with the form—with the spirit and not merely with the letter of statutes.

The enactment of every new statute of limitations necessarily operates to abridge the jurisdiction of the Supreme Court of the State in like manner. Clearly, a provision that no action shall be maintainable upon a contract six years after its breach, would be of indubitable validity, yet the jurisdiction of the state Supreme Court would thereby be reduced by the multitude of causes which would have been justiciable before it if this limitation had not been imposed by law.

Likewise, it is well established that the Legislature has power to provide that certain conditions shall be performed, or a certain period of time be permitted to elapse, before an action shall be maintainable. There are many instances of this power in the legislation regulating actions against municipal corporations. The charter of the City of New York (sec. 261) requires that notice of intention to sue must be given within six months after the claim accrued, and that at least thirty days must have elapsed since the demand was made before the action may be commenced. No one would seriously contend that these enactments were all void because their necessary effect is in every case temporarily to suspend the "general jurisdiction of the Supreme Court in law and equity", and, indeed, in many cases to defeat it altogether. In *Reining* v. *Buffalo*, 102 N. Y. 308, 311, such a statute was treated as valid and controlling, Chief Judge Ruger saying:

> "It is not in such a case necessary that the thing required should constitute one of the elements of a common law action, for if the legislature have made even a step in their remedy a condition of its prosecution it is essential not only that it should be taken, but that it should be affirmatively alleged and proved by the plaintiff. It is competent for them to attach a condition to the maintenance of a common law action as well as one created by statute and, when they have done so, its averment and proof cannot safely be omitted."

On principle, it is impossible to distinguish those statutes which suspend the plaintiff's right to sue for specified periods of time, from the statute now before the court, which likewise suspends the remedy for a designated period.

All this is, indeed, but part of the power, expressly reserved to the Legislature, in and by section 3 of Article VI of the state constitution, "to alter and regulate the jurisdiction and proceedings in law and equity." But it is not either necessary or expedient thus to restrict the scope of our contention; for it would, indeed, be a public misfortune that the most essential, the least limitable power of government, the police power—the power which can override conflicting rights of property and contract —should fail, even in the most serious emergencies, if it but encounter a remedy justiciable in the Supreme Court of the State of New York. It would, indeed, be very anomalous if the jurisdiction of a court—obviously confided to it for the public good alone—should fetter and defeat legislation necessary to the public good.

The menace for the future in laying down a rule which would necessarily stereotype every right and remedy now assertable in the Supreme Court of the State, cannot be exaggerated. There is, for example, to-day a large body of enlightened public opinion which favors the abolition of the right to sue for breach of promise of marriage. The proponents of this view contend that that form of action is more frequently than not an instrument of blackmail and coercion; that respectable parties rarely, if ever, avail of the remedy, and that the whole institution of marriage would be improved if there did not exist this means of coercing unwilling parties into fulfilling marriage promises or buying their peace. Some day this view may have the acceptance of the people generally. Will the Legislature then have no power to enact the will of the people into the law and public policy of the State in the interest of public morality, simply because such a course would tend to diminish the existing jurisdiction of the state Supreme Court?

Section 1780 of the Code of Civil Procedure forbids the Supreme Court of the State to take jurisdiction over certain classes of actions brought against foreign corporations by non-residents of the State. Prior to this enactment, the Supreme Court had exercised jurisdiction in this class of cases in its discretion; now this discretion is absolutely withdrawn from it. The validity of the Code provision was challenged upon this ground in *Payne* v. *New York, S. & W. R. R. Co.*, 157 App. Div. 302; but the court overruled the contention, saying (p. 305):

> "Nor do we think that section 1780, as aforesaid, so far as it regulates the exercise of the general jurisdiction of the Supreme Court, may be challenged properly as an attempt to deprive said court of some part of its general jurisdiction conferred upon it by the Constitution (Art. 6, §1). The Courts of this State are not bound generally to assume jurisdiction of causes of action arising outside the State, which exist only between parties not residents of this State. (*Collard* v. *Beach*, 81 App. Div. 582, and cases cited.) The provisions of section 1780, as aforesaid, declare the public policy of this State as to actions by non-residents against foreign corporations, and in making the declaration the legislature did not exceed its power."

It will be observed that in this latter case, it was held entirely constitutional completely and forever—and not merely for only a limited time and during a serious emergency—to withdraw from the state Supreme Court an important part of its discretion and jurisdiction, and that that course was sustained as constitutional because the statute in question was held validly to "declare the public policy of the State as to actions by non-residents against foreign corporations." The same reasoning applies in the case at bar. The Legislature has, in effect, itself declared the public policy of the State in respect

of the discretionary power of the court to stay the issuance of writs of possession. In so doing, as we have seen above, it has acted most wisely. The alternative would have been to overwhelm the Supreme Court in the City of New York with cases of this description and innumerable applications for such stays and extensions thereof and motions to vacate stays theretofore issued, and the practical result of leaving unregulated and unrestrained discretion in the court in this respect would have been virtually to incapacitate it from exercising jurisdiction in any other kind of cases.

See also *People ex rel. Crane* v. *Hahlo*, 228 N. Y. 309; *People ex rel. Hill* v. *Supervisors*, 49 Hun 476; *People ex rel. Ryan* v. *Green*, 58 N. Y. 295.

It is unnecessary to multiply further illustrations. Many will occur to the court on the most cursory consideration of the point. They all emphasize the fact that the continuance by the state constitution of the Supreme Court of the State with general jurisdiction in law and equity did not limit the exercise of the police power and the right and duty of the Legislature to declare the public policy of the State. Its clear purpose and intent were not to perpetuate any particular remedy, but to continue the Supreme Court as a great court of general jurisdiction over all remedies which might from time to time exist within the State. It would, therefore, be wrong for the Legislature to attempt to provide that a part of the jurisdiction of the Supreme Court should be taken from it and given to some other tribunal, judicial, legislative, or executive, exclusively, or should be assertable only in a particular part of the Supreme Court and not generally therein. Of this nature are the cases cited in

opposition to our views.* But it was never intended to impair the general legislative power of the State by prohibiting its effective exercise, if that required limitation of or interference with legal remedies. In such a case, there is no unconstitutional interference with the jurisdiction of the Supreme Court of the State. It still has "general jurisdiction in law and equity." In other words, whatever remedies at any time exist are enforceable before it. In the case at bar, for instance, the action of ejectment is still maintainable only in the Supreme Court in every case in which the public interest does not require it to be temporarily suspended; no other tribunal has any jurisdiction over this form of action, and no attempt has been made by the Legislature to erect any tribunal into a possessor of, or even a competitor for, any part of the jurisdiction of the Supreme Court of the State.

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* *People ex rel. Mayor* v. *Nichols*, 79 N. Y. 582; *Alexander* v. *Bennett*, 60 N. Y. 204; *De Hart* v. *Hatch*, 3 Hun 375; *Mussen* v. *Ausable Granite Works*, 63 Hun 367; *People ex rel. Swift* v. *Luce*, 204 N. Y. 478.

In *Kiglander* v. *Star Co.*, 90 Supp. 772, an act of the Legislature required a case which was entitled to a preference to be set down for a particular day and to be tried on that day. This act was held unconstitutional for the following reasons (p. 776):

> "The provisions of the act in question require that, the right to a preference and the intention to try at the term for which the application is made being shown, the court or justice must designate a day certain during that term, on which day the justice holding the court must try the cause, no matter whether the party moved against is ready for trial or not, no matter whether he has used due diligence to get ready or not, no matter whether his witnesses are sick or temporarily absent from the state or not, no matter whether his witnesses may reside in foreign countries and he has had no opportunity to take their evidence upon commission in the usual way or not. The court is commanded to set the cause down for a day certain, and try it on that day. Can it be said that the court would not be justified under this law in going on with the trial under such circumstances? Clearly not. It is commanded so to do; and it has never yet been held to be error to obey the plain mandate of a constitutional law. On the contrary, it would be error if it did not follow it. Can a judgment obtained under such circumstances be said to be obtained by due process of law? It seems to me clear that it cannot."

This case clearly has not the remotest resemblance to that at bar.

XV.

CHAPTER 947 IS APPLICABLE TO LEASES ENTERED INTO PRIOR TO ITS ENACTMENT.

The argument that chapter 947, governing actions of ejectment, is not to be deemed effective in respect of pre-existing leases, can be no more completely refuted than by considering the actual emergency which the Legislature had to meet and deal with.

The Legislature knew that in respect of one hundred thousand existing leases which would terminate on October 1st, 1920, notices to quit had been served on tenants, who, if the Legislature did nothing, would presumably be evicted on that day, and, in view of the existing housing shortage, would then have no shelter. This emergency involved the health, safety, morals and welfare of perhaps four or five hundred thousand men, women and children, and it could not be met at all if the leases under which they then had homes were to be left entirely unaffected, and if the covenants to quit contained therein were to be left undisturbed. The efforts of the Legislature to cure this impending disaster would have been illusory if they had not plainly and directly applied legal restraint in these numerous cases to existing leases.

But the legislative intent in the matter need not be left merely to inference. Writing of a companion bill—now chapter 942 which regulates summary proceedings in cases of holding-over upon the expiration of the term—the Joint Legislative Committee on Housing reported as follows (appendix, p. 153):

> "This bill will do away with the anxiety of the many people in New York who . . . have been served with notices to move on October 1st. The

> notices served upon people that they will have to vacate on October 1st will be wholly ineffectual after the passage of this bill."

This statement would have been an empty promise and a delusion if the Legislature, having limited hold-over summary dispossess proceedings as provided in chapter 942, had not likewise circumscribed the remedy in ejectment. It would have been the plainest futility to guard tenants under pre-existing leases from eviction in the Municipal Court of the City of New York, only to leave them to be evicted at the will and whim of their landlords in actions of ejectment in the Supreme Court of the State. No one realized that more clearly than the Joint Legislative Committee; and, accordingly, they proposed the bill which is now chapter 947, and reported in respect thereof in part as follows (appendix, p. 164):

> "There are provisions in the Code of Civil Procedure under the title of 'Recovery of possession of real property' by which a hold-over tenant might be dispossessed in an action in the Supreme Court. The summary proceeding of hold-over being taken away, a landlord can begin an action in the Supreme Court and recover judgment against the tenant by default in twenty days, and thus defeat the purpose of the legislation abolishing hold-overs except in three instances. To obviate this difficulty this bill provides," etc.

To read chapter 947, therefore, as inapplicable to leases theretofore entered into, would defeat completely the plain legislative intent, render the statute wholly ineffectual to meet the calamity it sought to avert, and charge the Legislature with stupidity. Courts do not sit for any such purpose. Their highest duty is to give effect to the legislative will (*Wilson* v. *New*, 243 U. S. 332, 359). Where the legislative intent is clear, as it is in the case at bar, no mere rule or principle of construction can

stand in the way. *United States* v. *Fisher*, 2 Cranch 358, 386; *Billings* v. *United States*, 232 U. S. 261, 282; *People ex rel. C. T. Co.* v. *Prendergast*, 202 N. Y. 188, 195-6; *People ex rel. Collins* v. *Spicer*, 99 N. Y. 225, 233; *People ex rel. Witherbee* v. *Supervisors*, 70 N. Y. 228, 236. As Mr. Chief Justice White said in *Billings* v. *United States*, *supra*:

> "While the rule is that statutes should be so construed as to prevent them from operating retroactively, that principle is one of construction and not of reconstruction, and therefore does not authorize judicial re-enactment by interpretation of a statute to save it from producing a retroactive effect."

In other words, the principle referred to is merely a rule for ascertaining and effectuating the legislative intent; and, where the intent is plain, that rule may not be invoked to pervert and defeat the will of the Legislature. *Lamb* v. *Powder River Live Stock Co.*, 132 Fed. 434, 436. "So many are the past transactions upon which the public good requires posterior legislation, that no government can preserve order, suppress wrong, and promote the public welfare without the power to make retrospective laws" (*Larkin* v. *Saffarans*, 15 Fed. 147, 150).

The rule upon the whole subject is well stated as follows by the court in *Johnston* v. *United States*, 17 Court of Claims 157, 171:

> "A remedial statute must be construed liberally, so as to afford all the relief within the power of the court, which the language of the act indicates that the legislature intended to grant. Courts will look into the occasion for the passage of such an act, and will consider the evils or wrongs which it seeks to remedy, their nature and extent, in order to determine how far it was intended that the act should reach, whether only to cases thereafter to arise, or to existing cases, or

retrospectively to cases entirely passed and consummated. (*Stewart* v. *Kahn*, 11 Wall. 493; *People* v. *Supervisors, &c.*, 70 N. Y. 228.)"

The statute in question is a procedural regulation, and it has long been the rule that "statutes regulating legal remedies [even in most important respects] are generally construed as operative upon an existing condition of things as well as upon conditions to arise after their enactment". *Laird* v. *Carton*, 196 N. Y. 169, 171-2. See also *Matter of Davis*, 149 N. Y. 539, 545; *Brearley School* v. *Ward*, 201 N. Y. 358, 363, *et seq.*; *Sackheim* v. *Pigueron*, 215 N. Y. 62, 73. Moreover, it should be realized that there is nothing retrospective in the operation of this act. It does not provide that those who were turned out of possession before its enactment on September 27, 1920, shall be restored to possession, but only that *after* that date no tenant then in possession shall be evicted unless it be in one of the excepted cases enumerated in the act. This is not retroactive legislation. *United States* v. *Freight Association*, 166 U. S. 290, 342; *Hollingsworth* v. *Virginia*, 3 Dallas 378.

XVI.

As to the landlord's right to evict his tenants upon permanently retiring from the business of letting habitation space for hire.

Finally, it has been suggested that even if the business of leasing tenements for profit be held to be one affected with a public interest, and as such subject to the police power, chapter 947 is, nevertheless, void because it prevents the landlord from discontinuing his business and thus ending the power to regulate him (*Guttag* opin-

ion, p. 156). Neither the case at bar, nor any other case which has yet come before the courts, requires the disposition of any such question. No landlord has even suggested that he wishes to empty his houses of tenants, and then permanently retire from the business of renting dwellings. The good faith of such an assertion would be a question of fact for a jury in a proper case. As Mr. Justice Blackmar stated in the *Rayland Realty Co.* case (opinions, p. 88):

> "It is not permissible to say that a landlord will dispossess his hold-over tenants for the purpose of holding the property vacant. His purpose is to increase the rent to the incoming tenant."

It is not to be assumed, therefore, that any dwelling or tenement house owner will want his property to keep it empty, or will seek to re-possess himself of it for any reason other than as a pure matter of business, and the case before the court is not to be viewed, therefore, in any merely theoretical or fanciful aspect. It cannot fairly be said that there is now presented for adjudication any case in which the owner seeks to empty his tenements simply in order to retire from the business of renting dwelling space. It will be time enough to pass upon such a peculiar and anomalous case when it arises.

But, notwithstanding the almost academic character of the argument, it is manifestly unsound. When a landlord desires to demolish a tenement, or use it for himself, or turn it over to a co-operative group who wish to use it entirely for themselves, the laws give adequate relief both by ejectment and summary proceedings (chaps. 942 and 947). In those clear and *bona fide* cases of withdrawal of the property from a business affected by a present public interest, the right so to withdraw is recog-

nized and aided by the statute. To have allowed this right untrammelled effect in other cases, however, would have been plainly to have enabled landlords to defeat the laws and to put a premium upon colorable schemes to evade them. The enactments wisely provided against any such schemes or performances.

But it should also be remembered that there is in any event no right in one engaged in such a business as the renting of houses or apartments to the public to withdraw at will during a period of emergency and *eo instanti* throw his tenants into the street. Not only should reasonable notice to the tenants be requisite before such a step can be taken, but also such a length of notice as would enable them to replace the service about to be withdrawn. The rule is well stated in the following extract from Professor Wyman's work on Public Service Corporations (vol. I, sec. 317):

> "It may be asserted with confidence that what is reasonable notice [of withdrawal from a public calling] in a particular case depends upon the character of the business. A teamster might withdraw upon a day's notice doubtless, as his patrons may quickly make other arrangements. A canal boat man might tie up at the end of any trip, for the other opportunities for shippers over the canal are numerous. But a railroad company may not without a long notice abandon its line. And a gas company could abandon its service only after a long enough period to provide a new supply. It is not principally the special privileges which these service companies have received that makes their withdrawal difficult; it is because the duplication of these particular services takes a long time, and, therefore, the public is so dependent upon the established service that it would lead to intolerable hardships if the proprietors were permitted to withdraw without long notice. A rule of law to meet all conditions would have to go so

> far as to say that one cannot withdraw from public service without notice sufficiently long to enable those deprived of the service to make the necessary arrangements for the provision of other service."

The Legislature, therefore, reasonably had power to declare how long tenement or apartment house service should be continued to tenants then actually in possession, even after a landlord had announced his intention to withdraw from the business of renting property for dwelling purposes, in view of the existence of the serious housing shortage and emergency which would prevent the creation of substitute housing space for the public affected for a considerable period of time. It is submitted that no court can rightly hold that, under the circumstances outlined above, it was an abuse of discretion for the Legislature to fix the period of two years during which to compel a landlord to leave his tenant in possession—always in exchange for full and fair compensation—when his business is so obviously affected with a widespread public interest.

The court will not fail to observe that the contention on behalf of the landlords, in ultimate analysis, is that they have the absolute constitutional right to withdraw their dwelling space from use and keep it tenantless as long as they see fit, even during a period of acute shortage of shelter; in other words, that they have an absolute and uncontrollable property *right* ruthlessly and arbitrarily to evict hundreds of thousands of men, women and children and leave them homeless, no matter what the consequences may be and even when offered reasonable rental value, and that, under the American consti-

tutional system, there is no longer any force in the long recognized maxim of jurisprudence—*Sic utere tuo ut alienum non laedas.*

It is confidently submitted that this court will not announce that such a doctrine of legislative inability to remedy a pressing evil and protect against oppression and extortion is the constitutional law of this country.

Conclusion.

For the foregoing reasons, it is submitted that the New York Emergency Housing Laws are in all respects constitutional.

In the end, reflection must disclose that the charge of constitutional infirmity made against these laws is a manifestation of the conservatism with which so many approach the unprecedented in legislation even when enacted to meet entirely unprecedented emergencies. Our constitutions do not prevent the use of unusual or novel means if adapted to the accomplishment of legitimate ends and appropriate to promote the public welfare. As Mr. Justice McKenna said in *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 409:

> "Against that conservatism of the mind, which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and National—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights

were restrained or their constitutional guaranties impaired."

The decree of the court below should, therefore, be affirmed.

Washington, D. C., February 28, 1921.

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CHAP. 942

AN ACT to amend the code of civil procedure, in relation to summary proceedings to recover the possession of real property in cities of a population of one million or more and in cities in a county adjoining such a city.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section twenty-two hundred and thirty-one of the code of civil procedure is hereby amended by inserting therein a new subdivision, to be subdivision one-a, to read as follows:

1-a. A public emergency existing, no proceeding as prescribed in subdivision one of this section shall be maintainable to recover the possession of real property in a city of a population of one million or more or in a city in a county adjoining such a city, occupied for dwelling purposes, except a proceeding to recover such possession upon the ground that the person is holding over and is objectionable, in which case the landlord shall establish to the satisfaction of the court, that the person holding over is objectionable; or a proceeding where the owner of record of the building, being a natural person, seeks in good faith to recover possession of the same or a room or rooms therein for the immediate and personal occupancy by himself and his family as a dwelling; or a proceeding where the petitioner shows to the satisfaction of the court that he desires in good faith to recover premises for the purpose of demolishing the same with the intention of constructing a new building, plans for which

new building shall have been duly filed and approved by the proper authority; or a proceeding to recover premises constituting a part of a building and land which has been in good faith sold to a corporation formed under a co-operative ownership plan whereof the entire stock shall be held by the stockholders in proportion to the number of rooms occupied or to be occupied by them in such building and all apartments or flats therein have been leased to stockholders of such corporation for their own personal, exclusive and permanent occupancy to begin immediately upon the termination of any tenancy of the apartments or flats leased by them existing on the date when this subdivision takes effect.

In a pending proceeding for the recovery of real property in such a city on the ground that the occupant holds over after the expiration of his term, a warrant shall not be issued unless the petitioner establishes to the satisfaction of the court that the proceeding is one mentioned in the exceptions enumerated in this subdivision.

This subdivision shall not apply to a new building in course of construction at the time this subdivision takes effect or commenced thereafter and be in effect only until the first day of November, nineteen hundred and twenty-two.

§ 2. This act shall take effect immediately.

EXPLANATION

HOLD-OVER PROCEEDING

This bill allows a landlord to dispossess a tenant who holds over for only four reasons, which are:

(a) That the person holding over is objectionable, and in that case the landlord must actually prove to the satisfaction of the court that the tenant is objectionable;

(b) Where the owner of record, being a natural person, seeks in good faith to recover the premises for the immediate and personal occupancy of himself and his family as a dwelling; or

(c) Where the owner wishes to demolish the premises with the intention of constructing a new building, plans for which shall have been duly filed and approved by the proper authorities, or

(d) A proceeding to recover premises constituting a part of a building and land which has been in good faith sold to a corporation formed under a cooperative ownership plan whereof the entire stock shall be held by the stockholders in proportion to the number of rooms occupied or to be occupied by them in such building and all apartments or flats therein have been leased to stockholders of such corporation for their own personal, exclusive and permanent occupancy to begin immediately upon the termination of any tenancy of the apartments or flats leased by them existing on the date when this subdivision takes effect.

This bill will do away with the anxiety of the many people in New York who are now holding their premises under short stays or have been served with notices to move on October 1st. The notices served upon people that they will be required to vacate on October 1st will be wholly ineffectual after the passage of this bill. In hold-over proceedings already brought, where a stay has been granted, the court cannot issue a warrant to put the tenant out unless it is for one of the causes mentioned above.

This bill does not apply to buildings in course of construction or commenced after this act takes effect.

CHAP. 943

AN ACT to amend the code of civil procedure, in relation to stays on appeal from final orders in summary proceedings.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section twenty-two hundred and sixty-two of the code of civil procedure is hereby amended to read as follows:

§ 2262. Warrants; how stayed on appeal. Where an appeal is taken from a final order, awarding delivery of possession to the petitioner, which establishes that a lessee or tenant holds over, after a default in payment of rent, *or after the expiration of his term,* or from an order or judgment affirming such final order, the issuing and execution of the warrant may be stayed by the order of the county judge, and in the city and county of New York by a justice of the supreme court, *or in any case by the appellate court or a justice thereof,* upon the appellant's giving the security required to perfect the appeal, and to

stay the execution of the order appealed from and also an undertaking to the petitioner in a sum and with sureties approved by a county judge or in the city and county of New York by a justice of the supreme court *or in any case by the appellate court or a justice thereof* to the effect that if, upon the appeal, a final determination is rendered against the applicant he will pay, *if he holds over after a default in payment of rent,* all rents accruing or to accrue upon the premises, or if there is no lease thereof, the value of the use and occupation of the premises subsequent to the institution of the special proceedings; *or, if he holds over after the expiration of his term, that he will pay all costs and damages which the petitioner may suffer by reason of the stay herein provided for. The court or justice above referred to may grant such order with or without notice upon the filing of an undertaking approved by such court or justice in an amount equal to not less than three months' rent of the premises at the rate to which the appellant was liable as rent for the month immediately prior to the institution of the special proceeding. The petitioner may at any time before the appeal is actually heard apply to such court or justice to increase the security given by the appellant. Wherever in this section an undertaking is required to be given by the appellant in lieu thereof may at his election pay into court a sum of money equal to the amount of such undertaking. Where such appeal has been taken, prior to the enactment of this section as amended, from a final order awaiting delivery of possession to the petitioner on the ground that the tenant holds over after the expiration of his term, a stay may be granted provided such appeal be pending and the circumstances warrant the granting thereof.*

§ 2. This act shall take effect immediately.

EXPLANATION

STAYING WARRANTS ON APPEAL.

It was found that the period for which a stay might be granted in a non-payment or hold-over proceeding was not long enough to enable the case to be heard on appeal. There was no power to extend this stay. This bill permits a justice of the Supreme Court or a justice of the Appellate Term to grant a stay until the appeal can be heard. The bill applies to pending appeals.

CHAP. 944.

AN ACT to amend chapter one hundred and thirty-six of the laws of nineteen hundred and twenty entitled "An act in relation to defenses in actions based upon unjust, unreasonable and oppressive agreements for rent of premises occupied for dwelling purposes in cities of the first class or in cities in a county adjoining a city of the first class," generally.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter one hundred and thirty-six of the laws of nineteen hundred and twenty, entitled "An act in relation to defenses in actions based upon unjust, unreasonable and oppressive agreements for rent of premises occupied for dwelling purposes in cities of the first class or in cities in a county adjoining a city of the first class," is hereby amended to read as follows:

§ 1. Unjust, unreasonable and oppressive agreements for the payment of rent having been and being now exacted by landlords from tenants under stress of prevailing conditions whereby the freedom of contract has been impaired and congested housing conditions resulting therefrom have seriously affected and endangered the

public welfare, health and morals in certain cities of the state, and a public emergency existing in the judgment of the legislature by reason thereof, it shall be a defense to an action for rent accruing under an agreement for premises in a city of the first class or in a city in a county adjoining a city of the first class occupied for dwelling purposes that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive.

§ 2. *Where the answer contains the defense mentioned in section one of this act, the plaintiff within five days after the filing of the answer or within such time as the court upon good cause shown may determine, shall file with the clerk of the court a verified bill of particulars, setting forth the gross income derived from the building of which the premises in question are the whole or a part; the number of apartments in the building and the number of rooms in each apartment, and the number of stores in such building; the rent received for each such apartment or store for the period of one year last past; the consideration paid by the landlord for the building, if he be the owner thereof, or if he be a lessee the rent agreed to be paid by him; the assessed valuation of the property and the taxes for the current year; the annual interest charge on any incumbrance paid by the landlord; the operating expenses with reasonable detail; and such other facts as the landlord claims affect his net income from such property. Issue shall not be deemed joined until the filing of such bill of particulars. Upon the plaintiff's failure to file said bill of particulars within the time limited the court upon motion of the defendant shall dismiss the complaint.*

§ 3. Where it appears that the rent has been increased over the rent as it existed one year prior to the

time of the agreement under which the rent is sought to be recovered, such agreement shall be presumptively unjust, unreasonable and oppressive.

§ 4. Nothing herein contained shall prevent the plaintiff from pleading and proving in such action a fair and reasonable rent for the premises and recovering judgment therefor, or from instituting a separate action for the recovery thereof.

§ 5. If in an action against the occupant of premises for rent and for the rental value of the use or occupation thereof, the plaintiff recovers judgment by default, the judgment shall contain a provision that if the same be not fully satisfied within five days after entry and service upon the defendant of a copy thereof, the plaintiff shall be entitled to the premises mentioned in the complaint and to the direction that a warrant shall issue commanding the sheriff, marshal or other officer charged by law with the duty of executing judgments to remove all persons therefrom.

§ 6. If in any action for rent or rental value, the issue of fairness and reasonableness of the amount demanded in the complaint be raised by the defendant, he must at the time of answering deposit with the clerk such sum as equals the amount paid as rent during the preceding month or such as is reserved as the monthly rent in the agreement under which he obtained possession of the premises. If the defendant fail to make such deposit, the court shall strike out the denial or defense raising such issue. Such deposit shall be applied to the satisfaction of the judgment rendered or otherwise disposed of as justice requires. Where a judgment is rendered for the plaintiff it shall contain a provision that if the same be not fully satisfied from the deposit or otherwise with-

in five days after the entry, and service on the defendant of a copy thereof, the plaintiff shall be entitled to the premises described in the complaint and a direction that a warrant shall issue commanding the sheriff, marshal or other officer charged by law with the duty of executing judgments to remove all persons therefrom.

§ 7. Whenever the court in which the action is brought has jurisdiction to vacate a judgment rendered upon default, it shall have power to open a default in an action mentioned in section five of this act to vacate, amend, correct or modify any process, judgment or warrant in furtherance of justice for any error in form or substance, and to grant a new trial upon any of the grounds for which a new trial may be granted by the supreme court in an action pending therein.

§ 8. In case of an appeal by the defendant, the execution of the judgment and warrant shall not be stayed, unless the defendant shall deposit with the clerk of the court the amount of the judgment and thereafter monthly until the final determination of the appeal an amount equal to one month's rental computed on the basis of the judgment. The clerk shall forthwith pay to the plaintiff the amount or amounts so deposited.

§ 9. This act shall not apply to a room or rooms in a hotel containing one hundred and twenty-five rooms or more, or to a lodging house or rooming house occupied under a hiring of a week or less.

§ 10. This act *as hereby amended shall not apply to a new building in the course of construction at the time this amendment takes effect or commenced thereafter and* shall be in force until November first, nineteen hundred and twenty-one.

§ 2. This act shall take effect immediately.

EXPLANATION

THE RIGHT TO SET UP THE DEFENSE THAT THE RENT IS UNJUST, UNREASONABLE, AND THE AGREEMENT IN RELATION TO THE SAME OPPRESSIVE.

The 25 per cent clause which was in the bill passed at the last session has been stricken out because it was found to have been so generally misunderstood by the public, and in some cases misapplied by the courts.

Under this new act where the landlord sues for his rent the burden of proving that the rent is just and reasonable is upon the landlord if the rent has been raised over the rent as it existed one year prior to the agreement upon which the action is brought.

Experience has shown that when the reasonableness of the rent has become an issue, the tenant was very much at a disadvantage at the trial, when a long schedule of income and expenses was introduced on behalf of the landlord. The tenant had no means of meeting the issue, not knowing in advance what the figures were. It has been provided that if the defense of unreasonableness be set up, the landlord shall furnish a bill of particulars which will apprise the tenant of the claims that he must meet and give him a reasonable opportunity to test the accuracy of the landlord's claim as to his expenses and income. This will work no great hardship upon the landlord, as he would naturally be compelled to produce these figures in any event and they are all within his knowledge and control.

The only way that the landlord can obtain an increase of rent at the present time is by bringing this action and getting before the court the question whether the rent that he demands is fair and reasonable. The case may be tried by the judge or, if either party demands it, before a jury. It might well be that a tenant, who was financially irresponsible, might suffer a judgment to be taken against him which would be worthless, and there would be no way in which the landlord could either recover his property or get his rent therefor. This, of course, would be a great injustice. It has, therefore, been provided that if the tenant sets up the defense that the rent is unjust and unreasonable he must deposit one month's rent with the clerk of the court. When the case is tried and a judgment rendered, the judgment is then satisfied out of the money deposited, if it be sufficient, and if not the tenant must pay the additional amount within five days, or the landlord may have a warrant to remove him from the premises.

If the tenant desires to appeal the case he must pay the amount determined by the court to be the fair monthly rent into court each month until the appeal is decided. This provision was made because it was thought in many cases it might be burdensome for a tenant to procure a bond. He always has the amount of his rent each month, and it is no hardship to pay the installments monthly to the clerk of the court. It is believed that by this action the rights of both parties are protected and each has an opportunity for his day in court, and no tenant will be forced out of his home so long as his rent is paid.

Hotels containing 125 rooms or more, and rooming houses occupied under a hiring for a week or less are exempted.

This bill does not apply to buildings in course of construction or commenced after this act takes effect.

CHAP. 945.

AN ACT to amend the code of civil procedure, in relation to summary proceedings to recover the possession of real property in cities of the first class and in cities in a county adjoining a city of the first class for default in the payment of rent.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision two-a of section twenty-two hundred and thirty-one of the code of civil procedure is hereby amended to read as follows:

2-a. No proceeding as prescribed in subdivision two of this section shall be maintainable to recover the possession of real property in a city of the first class or in a city in a county adjoining a city of the first class, occupied for dwelling purposes, unless the petitioner alleges in the petition and proves that the rent of the premises described in the petition is no greater than the amount *for which* the tenant *was liable* for the month preceding the default for which the proceeding is brought. Nothing in this subdivision shall preclude the tenant from interposing any defense that he might otherwise have. *The tenant may interpose the defense that the rent mentioned in the petition is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive, and if such defense be interposed, then the petitioner within five days after the filing of the answer or within such time as the court, judge or justice upon good cause shown may determine shall file with the clerk of the court a verified bill of particulars setting forth the gross income derived from the build-*

ing of which the premises in question are the whole or a part; the number of apartments in the building and the number of rooms in each apartment; and the number of stores in such building; the rent received for each such apartment or store for the period of one year last past; the consideration paid by the landlord for the building, if he be the owner thereof, or if he be a lessee the rent agreed to be paid by him; the assessed valuation of the property and the taxes for the current year; the annual interest charge on any incumbrance paid by the landlord; the operating expenses with reasonable detail; and such other facts as the landlord claims affect his net income from such property. Issue shall not be deemed joined until the filing of such bill of particulars. Upon the petitioner's failure to file said bill of particulars within the time limited, the court, judge or justice upon motion of the defendant shall dismiss the proceeding. This subdivision shall not apply to a room or rooms in a hotel containing one hundred and twenty-five rooms or more, or a lodging house, or rooming house, occupied under a hiring of a week or less. This subdivision *as amended shall not apply to a new building in course of construction at the time this amendment takes effect or commenced thereafter and* shall be in effect only until the first day of November, nineteen hundred and twenty-two.

§ 2. This act shall take effect immediately.

EXPLANATION

Proceedings to Dispossess for Non-Payment of Rent.

This amendment strikes out of the law as it now exists all reference to the so-called twenty-five per cent clause. No non-payment proceedings are maintainable where the rent has been increased over the amount for which the tenant was liable for the month preceding the default for which the proceeding is brought. If the landlord believes he is entitled to increase the rent his remedy will lie in action for the rent.

Experience has shown that when the reasonableness of the rent has become an issue, the tenant was very much at a disadvantage at the trial, when a long schedule of income and expense was introduced on behalf of the land-

lord. The tenant had no means of meeting the issue, not knowing in advance what the figures were. It has been provided that if the defense of unreasonableness be set up, the landlord shall furnish a bill of particulars which will apprise the tenant of the claims that he must meet and give him a reasonable opportunity to test the accuracy of the landlord's claim as to his expenses and income. This will work no great hardship upon the landlord, as he would naturally be compelled to produce these figures in any event and they are all within his knowledge and control.

Hotels containing 125 rooms or more, and rooming houses occupied under a hiring for a week or less are exempted. The reason for this is that it was found there were many apartment houses having a restaurant connection claiming that they were hotels. They rented their apartments on long leases, just the same as the owners of other apartment houses, and it was thought only fair that the same law should apply to both.

This bill does not apply to buildings in course of construction or commenced after this act takes effect.

Chap. 946.

An Act to amend the banking law, in relation to investment of public funds in bonds of the state land bank.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter three hundred and sixty-nine of the laws of nineteen hundred and fourteen, entitled, "An act in relation to banking corporations, and individuals, partnerships, unincorporated associations and corporations under the supervision of the banking department, constituting chapter two of the consolidated laws," is hereby amended by inserting at the end of article three a new section to be section one hundred and forty-nine, to read as follows:

§ 149. Bonds legal investment for public funds. Bonds of the land bank of the state of New York shall be a legal and valid investment for the sinking and trust funds of the state of New York or of any municipal corporation or political subdivision thereof.

§ 2. This act shall take effect immediately.

EXPLANATION

In 1914 the State authorized the organization of the land bank of the State of New York. It is a semi-public cooperative institution, the stock is held by cooperative savings and loan associations doing business under the provisions of the New York Banking Law and is intended to be a central institution for all the savings and loan associations of the State with power to assist them in procuring money to loan upon real estate, both urban and rural, on reasonable terms. The building and loan associations which become members of the land bank may deposit their bonds and mortgages. This collateral is held by the State Comptroller and the land bank issues its bonds secured by such collateral in an amount not to exceed seventy-five per centum of the par value of said collateral. The proceeds of the sale of the bonds are turned over to the savings and loan association applying for the money.

The State Superintendent of Banks, in an official report, said of these bonds: "It is difficult to conceive of a private institution of this character in which the possibility of loss could be more carefully minimized." Land bank bonds are legal investments for savings banks, executors, trustees and individuals. They are exempt from the State income tax but subject to the federal income tax. After the passage of the Federal Income Tax Law it became impossible for the State land bank to sell its 4½ per cent. taxable bonds, so that the bank has practically ceased to function. New York State has 254 savings and loan associations with $110,000,000 of assets and 210,000 members. Practically all of the assets are invested in small first mortgages on homes. The loans afford a safe security and the associations are of vast benefit in promoting home ownership.

This act makes these bonds a legal investment for sinking and trust funds of the State of New York of any municipal corporation or political subdivision thereof.

CHAP. 947.

AN ACT to amend the code of civil procedure, in relation to actions to recover the possession of real property in certain cities and to repeal section fifteen hundred and thirty-one-a thereof.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article one of title one of chapter fourteen of the code of civil procedure is hereby amended by adding at the end a new section, to be section fifteen hundred and thirty-one-a, to read as follows:

§ 1531-a. A public emergency existing, no action as prescribed in this article shall be maintainable to recover the possession of real property in a city of a population of one million or more or in a city in a county

adjoining such city, occupied for dwelling purposes, except an action to recover such possession upon the ground that the person is holding over and is objectionable, in which case the landlord shall establish to the satisfaction of the court that the person holding over is objectionable; or an action where the owner of record of the building, being a natural person, seeks in good faith to recover possession of the same or a room or rooms therein for the immediate and personal occupancy by himself and his family as a dwelling; or an action to recover premises for the purpose of demolishing the same with the intention of constructing a new building, plans of which new building shall have been duly filed and approved by the proper authority.

This section shall be in effect only until the first day of November, nineteen hundred and twenty-two.

§ 2. Section fifteen hundred and thirty-one-a of such code, as added by chapter one hundred and thirty-five of the laws of nineteen hundred and twenty, is hereby repealed.

§ 3. This act shall take effect immediately.

EXPLANATION

EJECTMENT.

There are provisions in the Code of Civil Procedure under the title of "Recovery of possession of real property" by which a hold over tenant might be dispossessed in an action in the Supreme Court. The summary proceeding of hold over being taken away, a landlord can begin an action in the Supreme Court and recover judgment against the tenant by default in twenty days, and thus defeat the purpose of the legislation abolishing hold-overs except in three instances. To obviate this difficulty this bill provides that until November 1, 1922, no action shall be maintainable in the Supreme Court to recover possession of real property in a city of one million or more or in a city in a county adjoining such city, occupied for dwelling purposes except where it is brought to recover possession because the tenant is objectionable, and it is proved that he is objectionable, or where the owner, being a natural person, seeks in good faith to recover possession of the property for his immediate personal occupation as a dwelling for himself and family, or where it is sought to demolish the building for the purpose of erecting a new building, the plans for which have been filed and approved by proper authority.

CHAP. 948.

AN ACT to amend chapter one hundred and thirty-seven of the laws of nineteen hundred and twenty, entitled "An act in relation to summary proceedings to recover the possession of real property in cities of the first class or in cities in a county adjoining a city of the first class during the existing emergency," in relation to the application of such act.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The title of chapter one hundred and thirty-seven of the laws of nineteen hundred and twenty, entitled "An act in relation to summary proceedings to recover the possession of real property in cities of the first class or in cities in a county adjoining a city of the first class during the existing emergency," is hereby amended to read as follows:

An act in relation to summary proceedings to recover the possession of real property in *certain* cities of the first class during the existing emergency.

§ 2. Section one of such act is hereby amended to read as follows:

§ 1. Application. The provisions of this act shall apply only to a summary proceeding in a city of the first class *having a population of one million or less* to recover the possession of premises occupied for dwelling purposes, other than a room or rooms in a hotel, lodging house, or rooming house, upon the ground that the occupant is holding over and continuing in possession of the premises after the expiration of his term, without permission of the landlord, and shall govern such a pro-

ceeding notwithstanding the provisions of any general or special act inconsistent herewith. The relief hereby provided shall be in addition to relief provided by any other act the provisions of which are not inconsistent herewith. This act being emergency legislation, its provisions shall be liberally construed to carry out the intent thereof. *This act as amended shall not apply to a new building in the course of construction at the time this amendment takes effect or commenced thereafter.*

§ 3. This act shall take effect immediately and shall be in force until November first, nineteen hundred and twenty-two.

EXPLANATION

The effect of this act is to make chapter 137 of the Laws of 1920, apply to Buffalo and Rochester only. Chapter 942 passed at the special session covers holdover proceedings in the City of New York and cities in a county adjoining such city.

Chap. 949.

An Act to amend the tax law in relation to the exemption from local taxation buildings planned for dwelling purposes.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter sixty-two of the laws of nineteen hundred and nine, entitled "An act in relation to taxation, constituting chapter sixty of the consolidated laws," is hereby amended by inserting therein a new section to be section four-b to read as follows:

§ 4-b. Exemption of new buildings from local taxation. The legislative body of a county, or the legislative body of a city with the approval of the board of esti-

mate and apportionment, if there be one in such city, or the governing board of a town, village or school district may determine that until January first, nineteen hundred and thirty-two, new buildings therein, planned for dwelling purposes exclusively, except hotels, shall be exempt from taxation for local purposes other than for assessments for local improvements during construction and so long as used or intended to be used exclusively for dwelling purposes, or if a building of four stories or more in height, used exclusively for dwelling purposes above the ground floor, provided construction was completed since April first, nineteen hundred and twenty, or, if not so completed, that construction be commenced before April first, nineteen hundred and twenty-two, and completion for occupancy be effected within two years after such commencement, or if now in course of construction within two years after this section takes effect.

§ 2. This act shall take effect immediately.

EXPLANATION

This act provides that the local legislative body of a county, city, town, village or school district may determine that new buildings, except hotels, therein shall be exempt from local taxation until January 1, 1932.

In cities where there is a board of estimate and apportionment it must have the approval of such board.

The buildings must be planned for dwelling purposes exclusively and are exempt only while so used or intended to be so used. Buildings of four or more stories in height may have stores on the ground floor and still have the exemption.

Construction must have been completed since April 1, 1920, or if not so completed must be commenced before April 1, 1922, and completed within two years after commencement. If now under construction the building must be completed within two years after this law takes effect.

It is to be noted that the exemption expires January 1, 1932, so that the sooner a building is completed the greater the exemption will be.

CHAP 950.

AN ACT to amend the code of civil procedure, in relation to summary proceedings to recover the possession of real property in cities of the first class and in cities in a county adjoining a city of the first class.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Title two of chapter seventeen of the code of civil procedure is hereby amended by adding thereto a new section, to be section twenty-two hundred and sixty-five-a, to read as follows:

§ 2265-a. Whenever the court in which the proceedings are brought has jurisdiction to vacate a final order rendered upon the default of the tenant, the court or a judge or justice thereof, may, pending a motion to vacate a final order rendered upon the default of the tenant, stay the execution of the warrant which was issued upon such default and shall, upon the vacation of such final order, vacate and set aside such warrant.

§ 2. This act shall take effect immediately.

EXPLANATION

POWER OF THE COURT TO VACATE A DISPOSSESS WARRANT.

It was found that a very anomalous situation had existed in our statutes for a long time. If a tenant had by chance failed to answer a precept and the final order was rendered against him by default and the warrant issued, there was no power in the court to vacate its warrant. This was so no matter how meritorious the excuse for the default might be. The only remedy was a troublesome application to the Supreme Court for an injunction. This bill remedies that defect and gives the court issuing the warrant power to vacate the warrant.

CHAP. 951.

AN ACT to amend the penal law, in relation to wilful violation of the terms of a lease.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section two thousand and forty of the penal law is hereby amended to read as follows:

§ 2040. Wilful violation of the terms of a lease. Any lessor, *agent, manager, superintendent or janitor* of any building, or part thereof, *the lease or rental agreement whereof by its terms, expressed or implied, requires the furnishing of hot or cold* water, heat, light, power, elevator service, telephone *or any other service or facility* to any occupant of said building, who wilfully or intentionally fails to furnish such water, heat, light, power, elevator service, telephone service *or other service or facility* at any time when the same are necessary to the proper or customary use of such building, or part thereof, or any lessor, *agent, manager, superintendent or janitor* who wilfully and intentionally interferes with the quiet enjoyment of the leased premises by such occupant, is guilty of a misdemeanor.

§ 2. This act shall take effect immediately.

EXPLANATION

WILFUL VIOLATION OF THE TERMS OF A LEASE REQUIRING THE FURNISHING OF WATER AND OTHER FACILITIES.

The bill passed at the last session made it a misdemeanor for a lessor to fail to furnish water, heat, light, power, elevator service and telephone service. In some cases where there was a wilful failure to render these services the lessor claimed that the responsibility was on his agent or employee for whose offense he could not be held liable. This bill makes the agent, manager, superintendent or janitor who wilfully fails to furnish these services also liable. One court held that the language of the statute said that water must be furnished and that this did not necessarily mean hot water. The present bill calls for hot or cold water if required.

CHAP. 952.

AN ACT to amend the code of civil procedure, in relation to the return day of precepts in summary proceeding to recover the possession of real property and the time of service thereof.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section twenty-two hundred and thirty-eight of the code of civil procedure is hereby amended to read as follows:

§ 2238. Precept. The judge or justice, to whom a petition is presented, as prescribed in either of the foregoing sections of this title, must thereupon issue a precept, directed to the person or persons designated in the petition, as being in possession of the property, and requiring him or them forthwith to remove from the property, describing it, or to show cause, before him, at a time and place specified in the precept, why possession of the property should not be delivered to the petitioner, or, in the case specified in the last section, to the owner or landlord. The precept must be returnable, not less than *five* nor more than *ten* days after it is issued; except that, where the proceeding is taken, upon the ground that a tenant continues in possession of demised premises, after the expiration of his term, without the permission of his landlord, and the application is made on the day of the expiration of the lease, or on the next day thereafter, the precept may, in the discretion of the judge or justice, be made returnable on the day on which it is issued, at any time after twelve o'clock, noon, and before six o'clock in the afternoon.

§ 2. Subdivision three of section twenty-two hundred and forty of the code of civil procedure is hereby amended to read as follows:

3. Where service cannot, with reasonable diligence, be made, as prescribed in either of the foregoing subdivisions of this section, by affixing a copy of the precept and petition upon a conspicuous part of the property.

If the precept is returnable on the day on which it is issued, it must be served at least two hours before the hour at which it is returnable; in every other case, it must be served at least *five* days before the day on which it is returnable.

§3. This act shall take effect immediately.

EXPLANATION

This bill lengthens the time within which a precept in a Municipal Court must be made returnable.

Heretofore it was not less than three nor more than five days and this bill makes it not less than five nor more than ten days. The present law requires that the precept must be served at least two days before it is returnable. This bill requires that it must be served at least five days before it is returnable.

Chap. 953.

An Act to amend the code of civil procedure, in relation to the jurisdiction of justices of the peace in certain cities of the second class.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section twenty-eight hundred and sixty-three of the code of civil procedure is hereby amended by inserting therein a new subdivision, to follow subdivision six, to read as follows:

6. *In a city of the second class adjoining a city of a population of one million or more, a justice of the peace*

shall not take cognizance of a civil action for the recovery of rent or the rental value of real property or of a summary proceeding to recover the possession of real property.

§ 2. This act shall take effect immediately.

EXPLANATION

So many complaints were made of the administration of the so-called rent laws in the city of Yonkers that the Legislature deemed it best to take actions for rent and summary proceedings out of the jurisdiction of the justices of the peace.

AS TO PUBLIC HEALTH AND MORALS.

The American Health Association, which is composed of the commissioners of the boards of health of the largest cities in the United States, convened in Detroit, Mich., on November 30 at the request of the committee on housing of the United States Senate and submitted the following statement based upon surveys recently made in each city:

DECEMBER 4, 1920.

HON. WILLIAM M. CALDER,
Senate Committee on Reconstruction,
29 West Thirty-ninth Street, New York City.

MY DEAR SENATOR CALDER: At the request of the Senate Committee on Reconstruction, I called together the health commissioners of this country from cities having a population of 200,000 or more. We met in Detroit on November 30 and remained in session for two days.

Reports were received from a considerable number of the cities of this size, and the representatives discussed the housing situation very seriously. It was rather remarkable that there was unanimity of sentiment regarding the problem. The fruit of our labors is shown by a formal statement which was unanimously passed by the conference.

I was directed to transmit our conclusions to your committee and to state that the health commissioners stand ready to support the Senate committee in their campaign for conditions which will make it possible to build houses in the cities of the United States. I can not speak too strongly of our conviction that the present housing situation is a real menace to the public health of this country.

Here is the formal statement:

"The housing survey undertaken by the health authorities of American cities of 200,000 persons or more has been completed. Several cities have submitted their information, and these reports hold in common certain outstanding features:

"1. In every city there is abnormal overcrowding. From 20 to 30 per cent. of the population of the cities studied is thus affected.

"2. These surveys show an average diminution of 80 per cent. in the normal volume of new buildings for residential purposes. This condition has continued for three years.

"3. As a result of the abnormal overcrowding, thousands of families are forced into insanitary and dangerous quarters. Health authorities are powerless because it is impossible to vacate such premises under present conditions. This usual legal remedy is useless to cope with the situation. It can not be used because there are no other and better places to which such families can remove.

"4. Overcrowding means close contact, and has resulted in a marked increase in the infant death rate. The relation of bad housing to child health is startling. Infant mortality is 50 per cent. higher in districts where there is the greatest overcrowding.

"5. Overcrowding has propagated and spread tuberculosis. This disease is at least twice as prevalent in overcrowded quarters as in areas of normal housing. Our records show that 80 per cent. of the tuberculosis patients are obliged to live at home. Overcrowding makes it impossible to segregate the patient and thus to protect other members of the family.

"6. All communicable diseases, especially those affecting the respiratory tract, are rapidly spread by overcrowding. Influenza and pneumonia are conspicuous examples of this evil. It is needless to mention the difficulty of controlling communicable diseases in the face of overcrowding, because of the impossibility of maintaining quarantine or isolation.

"7. Overcrowding bears an important relationship to the social diseases. This is evidenced by the undue prevalence of venereal diseases in communities where this situation is most acute. Lodgers are intermingled with the family, with all the obvious evils of such social arrangement.

"8. Living under the strain of unusual and insanitary conditions increases mental and moral

degeneracy. The lack of privacy is conducive to physical and moral suffering, and the lack of comfort so necessary to long life and happiness.

"9. It is the sense of this gathering that the ideal housing conditions to meet health, comfort, good morals, and good citizenship demand that every American family occupy a single dwelling. In communities where this is not feasible, single separate quarters or apartments, well lighted and well ventilated, must be placed within reach of the poorest of our citizens.

"10. This survey shows not only overcrowding and very limited building operations, but also a conspicuous absence of coordination of effort in reaching a solution. Efforts should be made to acquaint the pubic with the urgency of the housing danger. We must earnestly petition the Senate committee to take cognizance of, and to give publicity to the lamentable situation which is undermining the public health, the public morals, and the social stability of the Nation.

"11. It is imperative that your committee shall give attention to the influx of immigrants. Thousands of new arrivals have been brought into communities totally unable at the present time to decently house their present population. Europe is overrun with infectious diseases. Typhus fever, bubonic plague, cholera, smallpox, and various intestinal disorders threaten America. Immigration bears an important relationship to the entrance into our country of these diseases, and, with the present housing conditions, the danger is vastly greater.

"12. The entire housing problem is so urgent and its danger so imminent that decisive and immediate action is imperative. We beg of you to lose no time in finding a remedy for the conditions that threaten the lives of our people and the stability of our Government."

Respectfully,

ROYAL S. COPELAND, M.D.,
Commissioner.

MARCUS BROWN HOLDING COMPANY, INC., *v.* FELDMAN ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 731. Argued March 3, 7, 1921.—Decided April 18, 1921.

1. In view of the emergency declared by the legislature and found by the District Court in this case and in like cases by the highest court of the State, the New York laws enacted on September 27, 1920, to be in effect only until November 1, 1922, and regulating rights and remedies in respect of real property occupied for dwelling purposes in and about the City of New York, do not exceed the police power of the State in requiring that only reasonable rents shall be exacted or in denying the right to maintain actions to recover possession except upon the grounds that the occupant is holding over and is objectionable, or that the owner of record, being a natural person, seeks in good faith to recover for immediate occupancy by himself and family as a dwelling, or that the action is to recover possession for the purpose of demolishing the building with intention to construct a new one. P. 198. *Block* v. *Hirsh*, *ante*, 135.
2. *Held*, that such regulation, as applied in favor of tenants holding over under an expired lease in disregard of their covenant to surrender, did

not deprive the landlord of rights under the Fourteenth Amendment or the Contract Clause of the Constitution, although the lease was executed before and expired soon after the date of the legislation and the landlord before the enactment had entered into a new lease with a third party to go into effect shortly after the expiration of the old one. P. 198.

3. The legislation does not unduly discriminate in not including cities of less than a specified population, or buildings occupied otherwise than for dwelling purposes, or buildings in course of construction. P. 198.

4. Chapter 951 of the Laws of New York of 1920, in so far as it makes it a misdemeanor for the owner of an apartment house, or his agents, etc., wilfully and intentionally to fail to furnish to the tenant of an apartment such water, heat, light, elevator, telephone, or other service as may be required by the terms of the lease and necessary to the proper and customary use of the building, cannot be said to impose involuntary service in violation of the Thirteenth Amendment. P. 199.

269 Fed. Rep. 306, affirmed.

THIS was a direct appeal, under § 266 of the Judicial Code, from a decree of the District Court in a suit brought by the owner of an apartment house in New York City for the purpose of ousting certain holding-over tenants through a mandatory injunction, and of restraining the District Attorney of the County of New York from taking criminal proceedings against the plaintiff or its agents for failure to furnish water, heat, light, elevator and other service. The defendants relied on recent legislation of New York, referred to in the opinion,[1] regulating the

[1] The following summary of the chief features of these New York "housing acts" is added for the convenience of those who desire a quick view.

C. 942, Laws of 1920, declares a public emergency to exist, and provides that summary proceedings shall not be maintainable to recover the possession of real property occupied for dwelling purposes in a city of a population of one million or more or in a city in a county adjoining such a city, except (1) where the person holding over is objectionable, (2) where the owner of record, being a natural person, desires the

rights and remedies of landlords and tenants in New York City and vicinity,—which the plaintiff assailed as unconstitutional. The District Court sustained the legislation, as it applied to the case, and dismissed the bill. See 269 Fed. Rep. 306. The facts are given in the opinion, *post*, 196.

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premises for immediate and personal occupancy by himself and his family as a dwelling, (3) where the owner intends to demolish the premises and rebuild, or (4) where the building is to be taken over by a coöperative ownership group. The landlord must show that the proceeding is one mentioned in the enumerated exceptions. The act is inapplicable to buildings in course of construction or commenced after the date of the act, and is to be in effect only until November 1, 1922.

C. 943, Laws of 1920, regulates stays on appeals from final orders in summary dispossession proceedings.

C. 944, Laws of 1920, amending c. 136, Laws of 1920:

Section 1, after reciting the existence of a public emergency, declares that it shall be a defense to an action for rent accruing under an agreement for premises in a city of the first class, etc., occupied for dwelling purposes, that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive.

Section 2 requires the landlord, where the defense of unreasonable rent is set up, to file a bill of particulars setting forth certain material facts relevant to the issue of the reasonableness of the rent.

Section 3 provides that where it appears that the rent has been increased over the rent as it existed one year prior to the time of the agreement under which the rent is sought to be recovered, such agreement shall be presumptively unjust, unreasonable and oppressive.

Section 4 permits the landlord to plead and prove in such action a fair and reasonable rent and to recover judgment therefor, or to institute a separate action for the recovery thereof.

Section 5. Where, in an action for rent or rental value, the landlord secures judgment by default, he shall, in addition to a money judgment, be put in possession if payment be not promptly made.

Section 6. If, in such action for rent or rental value, the issue of reasonableness of the amount demanded be raised by the defendant, he must deposit in court a sum equal to the amount paid as last month's rent or the rent reserved as the monthly rent in the agreement under which he obtained possession, such deposit to be applied to the satisfac-

Mr. Joseph A. Seidman for appellant:

From the earliest colonial days to the present time the people of the State of New York have refused to delegate to its legislative bodies the power to interfere

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tion of the judgment rendered, or otherwise disposed of as justice requires. Where judgment is rendered for the plaintiff, if the same be not fully satisfied from the deposit or otherwise within five days after entry, the plaintiff shall be entitled to the premises and a warrant shall issue commanding the sheriff, etc., to remove all persons therefrom.

Section 7 relates to the vacation of default judgments, to vacation and amendment of process, etc., and granting of new trials.

Section 8. "In case of an appeal by the defendant, the execution of the judgment and warrant shall not be stayed unless the defendant shall deposit with the clerk of the court the amount of the judgment and thereafter monthly until the final determination of the appeal an amount equal to one month's rental computed on the basis of the judgment. The clerk shall forthwith pay to the plaintiff the amount or amounts so deposited."

Section 9 renders the act inapplicable to hotels containing 125 rooms or more or to lodging or rooming houses occupied under a hiring of a week or less.

Section 10 exempts buildings in course of construction or commenced after the date of the act. The act is to be in force only until November 1, 1922.

C. 945, Laws of 1920, allows summary dispossession proceedings for nonpayment of rent, only where the petitioner alleges and proves that the rent is no greater than the amount for which the tenant was liable for the month preceding the default, and provides for testing the reasonableness of the rent in substantially the same manner as in an action for rent, which is regulated by c. 944, *supra*. In effect only until November 1, 1922.

C. 947, Laws of 1920, limits until November 1, 1922, the action of ejectment, in substantially the same manner as c. 942, *supra*, limits summary proceedings.

C. 951, Laws of 1920, amending § 2040 of the Penal Law, makes it a misdemeanor for any lessor or his agents, etc., wilfully or intentionally to fail to furnish necessary hot or cold water, heat, light, power, elevator service, telephone or any other service, required by the lease, or wilfully and intentionally to interfere with the quiet enjoyment of the leased premises by the occupant.

with the recognized rights of private property. By the first state constitution, of 1777, such parts of the common law of England and the statutes of the Colony as were not repugnant to the constitution were continued. Fundamental and acknowledged principles were perpetuated. *Gautier* v. *Ditmar*, 204 N. Y. 20; *Waters & Co.* v. *Gerard*, 189 N. Y. 302; *Underwood* v. *Daniell*, 50 N. Y. 274.

Except in the abatement of public nuisances or to avoid imminent danger, property cannot be taken or destroyed by the legislature without compensation, and it cannot be taken even with compensation, except for public use. Constitution of New York, Art. I, §§ 1, 6;, Fourteenth Amendment; *Brevoort* v. *Grace*, 53 N. Y. 245, 255; *People* v. *Fisher*, 190 N. Y. 468; *Rockwell* v. *Nearing*, 35 N. Y. 302; *Powers* v. *Bergen*, 6 N. Y. 359; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 177, 178; *Embury* v. *Conner*, 3 N. Y. 511.

Due process may be tested by the common law as settled in England before the Declaration of Independence, *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276; *Lowe* v. *Kansas*, 163 U. S. 81; but our opponents are compelled to invoke decisions on laws authorized expressly by state constitutions or on powers incidental to the express powers of Congress; to rely upon the rules of Ancient Rome governing the rights of serfs and tenants who were mere slaves, upon the Irish Land Bills, and upon laws enacted here and by Parliament during the World War. They might have gone further and asked us to adopt as laws the decrees of Soviet Russia.

Wherever legislation has been sustained as necessary to secure the health, welfare, safety, and good order of the community, it was prospective and not retroactive; it related to future conduct and did not affect past transactions, except where enacted by express consti-

tutional authority. *Buffalo* v. *Chadeayne*, 134 N. Y. 163. Retroactive legislation destroys vested rights and interests in property. The police power is a regulatory power. Again, legislation under police power must be for the general public and not for a particular class or for the benefit of private individuals. *Eubank* v. *Richmond*, 226 U. S. 137.

The State may not, except in the case of monopolies and public utilities, compel the sale of merchandise or license the use of private property, even for compensation. *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 256; *Producers Transportation Co.* v. *Railroad Commission*, 251 U. S. 228, 252; *Chesapeake & Potomac Telephone Co.* v. *Manning*, 186 U. S. 238, 247.

We are told that what shall be regulated depends entirely upon the peculiar economic and social conditions of the times. If once the door shall be opened to that doctrine, all significance of the constitutional guaranty will be lost. "Illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States*, 116 U. S. 616, 635.

It is true that shelter is as much a necessity as bread, and it is contended that it is an obligation of the State to see that its citizenry does not lack such necessities. But it is not contended that the State should provide them gratis for physically and mentally able citizens. Should not the State afford gainful employment to those who lack such necessities? Or is the trader or manufacturer to be compelled by law to do so, or the banking institutions to furnish the needed money?

If in the opinion of the legislature the alleged emergency justified the exercise of the power of eminent domain, it should have authorized the taking of the property for public use in accordance with the state constitution. *Stell* v. *Mayor*, 95 N. J. L. 38.

The sponsors of the legislation urge "emergency" to silence the laws while citizens are being deprived of their property rights. They demand that constitutional bulwarks created for the protection of liberty and property be destroyed because of an alleged "public necessity," for alleged humanitarian causes. Similar distressing conditions and alleged "emergencies" were urged before this court (*Edwards* v. *Kearzey*, 96 U. S. 595, 604) in support of the Homestead Exemption Laws of North Carolina to uphold their constitutionality in so far as they affected obligations contracted before they came into effect. Mr. Justice Swayne, who delivered the majority opinion, went into the history of the country preceding the adoption of the Constitution, in order to show that the very purpose of the constitutional prohibitions was to prevent legislatures from meddling with private business and from tampering with obligations of contract in times of stress.

It often happens that a contract becomes impossible of performance because of a law subsequently enacted. There is a consequent impairment of performance, *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 482, 484, but not of obligation. The statutes now under consideration impair the obligation, and not merely the performance of the obligation. The legislature left the tenant free to perform his obligation, if he so desired, but at the same time it discharged him from that obligation for the sole purpose of preventing its enforcement by the lessor. The law operates directly upon the contract,—destroys it completely without prohibiting its performance. The impairment of the obligation is not the indirect result of police regulation of the conduct of particular business. These laws were not enacted for the regulation of the business of the landlord.

The legislature assumed authority to discharge the obligation of the tenant to surrender possession on the

expiration of the term specified in the lease; to make a trespass a lawful possession; to extend all of the lessor's obligations while the holdover desires to continue in possession; to prevent the lessor from performing his obligation under another lease entered into before the enactment of the law, which by its terms was to become operative after the date of this enactment. In exercising this power the legislature has not imposed upon the person holding over the obligation to pay the rent reserved in his lease, the stipulated rental value as fixed by the parties is disregarded. The power to fix the rental value is delegated to a court or jury. Such innovations are clearly repugnant to the Constitution. *Wilmington & Weldon R. R. Co.* v. *King*, 91 U. S. 3, 5; *Effinger* v. *Kenney*, 115 U. S. 566, 571.

The rule has always been that, as a State cannot enact a law acting directly upon the terms of the contract, so also it cannot pass a law professing to regulate the remedy when, in effect, it impairs the obligation of the contract. *Gantly* v. *Ewing*, 3 How. 707; *Barnitz* v. *Beverly*, 163 U. S. 118; *Nelson* v. *St. Martin's Parish*, 111 U. S. 716; *McGahey* v. *Virginia*, 135 U. S. 662; *Kring* v. *Missouri*, 107 U. S. 221; *Fletcher* v. *Peck*, 6 Cranch, 87, 138; *People* v. *Batchellor*, 53 N. Y. 128, 140; *Brevoort* v. *Grace*, 53 N. Y. 245; *Adair* v. *United States*, 208 U. S. 161, 173.

Upon the failure of the tenants to surrender possession on September 30, 1920, the plaintiff had at least five remedies, namely: (1) To treat the tenancy as one at will or sufferance and terminate it by giving the notice required by statute (unnecessary at common law, *Reckhow* v. *Schanck*, 43 N. Y. 448); (2) to treat the lease as renewed for another year (*Herter* v. *Mullen*, 159 N. Y. 28); (3) to reënter and by use of reasonable force eject the occupants; (4) to maintain the common-law action of ejectment; or (5) to sue in trespass for damages. The law then in force assured to the owner the right to

possession on the expiration of the term, and imposed upon the tenant the obligation to surrender. That right could not be taken or the obligation destroyed without due process of law. *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 544, 570; *Barson* v. *Mulligan*, 198 N. Y. 23, 25; *Adams* v. *Cohoes*, 127 N. Y. 175, 182. For a breach of the covenant to surrender the lessor was entitled to recover damages. *Vernon* v. *Brown*, 40 App. Div. 204. All of these rights were secured to the plaintiff and its grantors under the common law in force at the time of the adoption of the State and Federal Constitutions. They were annexed to the contract at the time it was made. *Bronson* v. *Kinzie*, 1 How. 311; *McCracken* v. *Hayward*, 2 How. 608; *Walker* v. *Whitehead*, 16 Wall. 314. Forfeitures of such rights in property cannot be adjudged by legislative act, and confiscations without a judicial hearing after due notice are void. Yet this is exactly what these innovations undertake to do. The person applying for his remedies is not permitted to come into court. *Gilman* v. *Tucker*, 128 N. Y. 190, 205; *Missouri Pacific Ry. Co.* v. *Humes*, 115 U. S. 512, 521.

Statutes affecting remedies which do not impair the obligation of contract may be constitutionally valid, provided a reasonable time be allowed before the change or repeal of remedy takes effect. Cooley, Const. Lim., 6th ed., p. 431; *Wheeler* v. *Jackson*, 137 U. S. 245; *Antoni* v. *Greenhow*, 107 U. S. 769. Usury has been regarded with abhorrence from the earliest times, and yet any law declaring a transaction illegal because of usury, which was legal when made, would be constitutionally void. *Sturges* v. *Crowninshield*, 4 Wheat. 122, 206; *Van Rensselaer* v. *Snyder*, 13 N. Y. 299; *Conkey* v. *Hart*, 14 N. Y. 22; *Von Hoffman* v. *Quincy*, 4 Wall. 535, 552. These laws clog not only the right to recover possession, but also the right to recover the rent voluntarily agreed upon by the contracts in force when they were enacted.

"The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment." *Lochner* v. *New York*, 198 U. S. 45, 53. In all such cases as *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389; *Mobile* v. *Yuille*, 3 Ala. N. S. 140; *Louisana Bread Case*, 12 La. Ann. 432, the control of the property was left entirely to the owner engaged in the particular business regulated. In the *Lewis Case* the court points out that the business of insurance is essentially different from ordinary commercial transactions, and, according to the sense of the world from the earliest times,—certainly the sense of the modern world,—is of the greatest public concern. It was not a private business, but "clothed with a public interest," and therefore subject "to be controlled by the public for the common good."

If the leasing of dwelling houses and apartments were a business charged with a public use, the legislation would be nevertheless unconstitutional, because it inhibits the owner from withdrawing his property from the alleged public use. *Munn* v. *Illinois*, 94 U. S. 113, 126, 133; *Budd* v. *New York*, 143 U. S. 517, 536. It compels him to continue the business with persons with whom he does not desire to deal. The owner's intention cannot possibly be determined, as to whether he desires to continue the business of renting dwelling houses, until the possession of his property is restored to him.

These laws are also unconstitutional because they violate the guaranty of equal protection of the laws in disregard of the Fourteenth Amendment. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558, 559. The right to maintain summary proceedings and actions of ejectment is still reserved to that class of landowners who may desire to destroy their buildings for the purpose of erecting new buildings, to those desiring the premises for personal occupancy and to owners of office, factory

or other buildings occupied for business purposes and to owners of hotel property; to every owner of property in cities of the third class and in some instances to the owners of property in cities of the second class; to owners of buildings now in course of construction or which may hereafter be erected. The housing conditions and congestion prevail all over the country and in every city in the State of New York. Therefore, there was no reasonable ground for the classification.

Assuming that the State has the power, directly or indirectly, to subsidize new buildings either by cash payments or by remission of taxes, it has no power to discriminate between the owners of existing buildings and the owners of buildings to be erected, in respect of their compensation for the use of their property. *Merchants' & Manufacturers' Bank* v. *Pennsylvania*, 167 U. S. 461, 463; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 112.

The legislation creates involuntary servitude, prohibited by the Thirteenth Amendment. The legislature, by c. 951, has practically made landlords persons subject to compulsory service, who must serve "statutory tenants" in possession of their property, against their will and consent. *Clyatt* v. *United States*, 197 U. S. 207, 216. This legislation in effect declares a suspension for a period of two years of the landowner's civil rights guaranteed to him by the State and Federal Constitutions, which secure to him the liberty to refuse business relations with anyone with whom he does not desire to contract. Similar legislation has been condemned. *Adair* v. *United States*, 208 U. S. 161; *Bailey* v. *Alabama*, 211 U. S. 452; *People* v. *Marcus*, 185 N. Y. 257.

No emergency can justify an exercise of legislative power to compel one man to render involuntary service to another. *Ex parte Milligan*, 4 Wall. 2, 18.

Mr. David L. Podell, with whom *Mr. Samuel R. Gerstein*, *Mr. Martin C. Ansorge*, *Mr. Benjamin S. Kirsh* and *Mr. J. J. Podell* were on the brief, for the tenant appellees.

Mr. Robert S. Johnstone and *Mr. John Caldwell Myers* filed a brief on behalf of Edward Swann, as District Attorney of the County of New York, appellee:

The District Court had no jurisdiction to entertain the suit as it did not appear that the matter in controversy exceeded three thousand dollars.

The complainant has a plain, adequate and complete remedy at law.

Chapter 951, Laws of New York 1920, is a valid exercise of the State's police power. *Price* v. *Illinois*, 238 U. S. 446, 451; *Sligh* v. *Kirkwood*, 237 U. S. 52, 59; *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67; *Manigault* v. *Springs*, 199 U. S. 473, 480; *Tenement House Department* v. *Moeschen*, 179 N. Y. 325.

Mr. William D. Guthrie, with whom *Mr. Julius Henry Cohen*, *Mr. Elmer G. Sammis* and *Mr. Bernard Hershkopf* were on the brief, for the Attorney General of the State of New York, by special leave of court:

The existence of an emergency in the City of New York and the evidence of the shortage of housing accommodations and the danger to be apprehended from widespread evictions are exhibited by the official reports, such as the messages of the Governor to the legislature, the reports of his Reconstruction Commission, the reports of the Joint Legislative Committee on Housing, the report of the Mayor's Committee on Rent Profiteering in the City of New York, and the bulletins of the Health Department of the City of New York.

Perhaps no legislation was ever passed by the legislature which was the subject of more exhaustive investigation, and the reports above referred to are, therefore,

entitled to even greater weight than is usually accorded such official findings and documents. *Wilson* v. *New*, 243 U. S. 332; *McLean* v. *Arkansas*, 211 U. S. 539, 547, 548; *People* v. *Charles Schweinler Press*, 214 N. Y. 395, 402; *Cockcroft* v. *Mitchell*, 187 App. Div. 189, 193.

In view of the facts thus revealed it cannot be reasonably doubted that a shortage of housing facilities still exists and it can hardly be seriously suggested that the legislature was acting arbitrarily in fixing November 1, 1922, as the probable duration of the emergency or crisis. Longer periods have been adopted in some jurisdictions. If the prediction does not square with the facts as they develop in the future, the courts can grant relief, even if the legislature should neglect to do so. *Castle* v. *Mason*, 91 Oh. St. 296, 303. See also *Sullivan* v. *Shreveport*, 251 U. S. 169, 171; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 162; *Johnson* v. *Gearlds*, 234 U. S. 422, 446; *Perrin* v. *United States*, 232 U. S. 478, 486; *Municipal Gas Co.* v. *Public Service Commission*, 225 N. Y. 89, 95, 97. It may not, however, be presumed that when that time comes the legislature will not itself repeal these laws.

In determining the constitutionality of statutes passed in the exercise of the police power, the courts have attached much weight to analogous legislation in other countries enacted to remedy similar conditions or to meet similar governmental problems. *Muller* v. *Oregon*, 208 U. S. 412, 419, 420; *People* v. *Charles Schweinler Press*, 214 N. Y. 395, 403. The conditions in New York City were the same as those which existed in all congested centers throughout the world as a result of the World War. Like causes had produced like effects.

Neither the contract clause nor the due process clause of the Constitution abridges the power or duty of the legislature to enact appropriate and necessary laws in order to protect the health, safety, order, morals, or gen-

eral welfare of the public. *Hadacheck* v. *Los Angeles*, 239 U. S. 394, 409, 410; *Nechamcus* v. *Warden*, 144 N. Y. 529, 535; *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467; *Producers Transportation Co.* v. *Railroad Commission*, 251 U. S. 228, 232; *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372, 375.

Laws which forbade the erection of certain types of buildings, which prohibited certain kinds of businesses, fixed certain prices, abolished certain valuable remedies, like distress, etc., have all been uniformly upheld as valid exercises of the police power notwithstanding the fact that they seriously impaired or wholly wiped out pre-existing private contracts. The only inquiry has been whether the statute in question was a proper exercise of the power of government, that is, whether in any aspect it could be regarded as passed in the public interest and as reasonably calculated to subserve that interest, due allowance being made for the broad discretion vested in the legislative body in these respects, and whether the means were reasonably appropriate and adapted to a legitimate end. If it were possible for individuals to estop due exercises of governmental power by private contracts, private agreements could impair the legislative power in practically all classes of cases.

Nor is the question to be decided put upon any different basis by urging that the statutes interfere with the liberty of contract as distinguished from the impairment of contract. That right is and may also be qualified and limited in the public interest. *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 567; *McLean* v. *Arkansas*, 211 U. S. 539, 545; *Rail & River Coal Co.* v. *Ohio Industrial Commission*, 236 U. S. 338, 349.

Equally immaterial is it that the statutes interfere with property rights. That, too, may be lawfully done by the legislature in the reasonable exercise of its police power. It constitutes but a taking by due process of

law if it be really a taking at all.—Citing many cases, including: *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 593; *Nechamcus* v. *Warden*, 144 N. Y. 529, 535; *In re Wilshire*, 103 Fed. Rep. 620, 622; *Noble State Bank* v. *Haskell*, 219 U. S. 104, 111; *People* v. *Griswold*, 213 N. Y. 92, 96, 97; *Armour & Co.* v. *North Dakota*, 240 U. S. 510, 513; *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 569. Here the State requires only such a concession as it has been repeatedly held by this court government is constitutionally entitled to require, namely, a concession appropriate to "exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent." *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527, 531. See also *Clark* v. *Nash*, 198 U. S. 361; *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110.

There is no force in the contention that these laws are solely in the private, as contrasted with the public, interest because they redound to the benefit of private parties, namely, tenants. Use by the general public is inadequate as a universal test. *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527, 531. Witness the usury laws, laws regulating railroad rates, tenement house laws, and the employers' liability acts.

Courts are not at liberty to circumscribe the police power by impracticable points of view or by unreasonably pressing the alleged "absolute" rights of property. The police power exists to meet the practical problems which arise from day to day; and the science of government consists in adjusting relative rights and duties in order "to promote the general welfare." *Noble State Bank* v. *Haskell, supra.*

These laws are not unreasonable in laying the burden

on the landlord of showing that the rent is reasonable, or in preventing him from retaking possession oppressively, where he does not require it for his own use or to rebuild, and where the tenant is not objectionable. In every fair and reasonable situation he may have his property; but where he desires to evict without reason, the law prohibits his doing so during the shortage and crisis, provided the tenant pays the reasonable rental value of the premises.

If these enactments appear in any aspect extraordinary, it is only because the crisis is unprecedented; and it was long ago declared that (*Legal Tender Cases*, 12 Wall. 457, 540) "It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times." See *American Land Co.* v. *Zeiss*, 219 U. S. 47, 60; *Wilson* v. *New*, 243 U. S. 332, 347, 348; *Bowditch* v. *Boston*, 101 U. S. 16, 18, 19; *Edmonson* v. *Ferguson*, 11 Missouri, 344, 346; *Breitenbach* v. *Bush*, 44 Pa. St. 313, 318, 319; *Hoffman* v. *Charlestown Five Cents Savings Bank*, 231 Massachusetts, 324; Soldiers & Sailors Civil Relief Act, 40 Stat. 444, §§ 100, 103, 201, 302; *Weed & Co.* v. *Lockwood*, 266 Fed. Rep. 785, 788; c. 80, § 2, 41 Stat. 297. From time immemorial, a feeble tenantry have been protected from oppression during times of emergency or misfortune.

One of the inherent and fundamental purposes of all civilized government is to prevent extortion and oppression and to safeguard the public; and in the light of that principle all constitutions must, of course, be read. It was early realized that there were many callings and businesses to which the public necessarily had to resort and in which, therefore, they had an interest. If these were to be left undisturbed by the law, it was patent that they would in numerous instances have practically unlimited power to oppress the public. Accordingly,

government was called upon to protect the public from extortion, and both then and now callings and property charged with a public interest have been regulated by the State. What shall be so regulated depends entirely upon the peculiar economic and social conditions of the times. See c. I, Wyman's "Public Service Corporations."

It was not necessary that persons thus subjected to regulation should have a monopoly—though that element, if it existed, served to emphasize their capacity to do public harm at will; or that they should enjoy a special privilege or franchise—though that might serve to make clearer their duty to the public. *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391; *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, 411.

The public interest which warrants the regulation of such ordinary, private, competitive and unfranchised businesses as grain elevating (*Munn* v. *Illinois*, and *Budd* v. *New York*, *supra*), fire insurance (*German Alliance Ins. Co.* v. *Lewis*, *supra*), laundrying (*Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 337–8) bread baking (*Mobile* v. *Yuille*, 3 Ala. N. S. 140; *Louisiana Bread Case*, 12 La. Ann. 432), etc., is incomparably smaller than that which underlies the exertion of the legislative power over the business of renting apartments and houses for dwelling purposes in densely populated cities like New York. The vital principles of government, it is submitted, have not become static or fallen into decadence, but, on the contrary, are still progressive and competent to deal practically with extortion, oppression and emergency wherever and whenever they appear.

From the earliest times the British Government has never hesitated either actually to fix prices when other means proved unavailing, or to require, in general terms, that vendors of necessaries shall sell them at reasonable

prices and moderate gains. Wages, herrings, clothes, poultry, candles, hats, beer, wine, butter, cheese, bread and numerous other commodities were thus from time to time regulated as necessity required. That the power to enact such laws passed to the several States has always been recognized. And it has never been held that such regulation in time of shortage and public emergency, in order to prevent widespread public oppression and suffering, unlawfully deprived an individual of his property, merely because it prevented him from reaping the gains of an extortionate and oppressive use of his own. The vivifying principle was always in the maxim, *Sic utere tuo ut alienum non lædas.*

No one would now question the right of a State to fix the rate of interest; and it is no answer to assert that the usury laws furnish no analogy since they are in reality a relaxation of a prohibition of the common law against charging any interest at all. *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 409.

The usury laws are an illustration also of the right of the legislature to conclude that in certain relations it is in the great majority of cases impossible for the parties to deal at arms' length and with unimpaired freedom of will, and, consequently, of the right of the legislature in such instances to refuse force and effect to contracts so made or require them to be modified so as to conform to justice and fairness. *Holden* v. *Hardy*, 169 U. S. 366, 397.

The legislature certainly has the power to regulate and modify common-law and equitable defenses. *Arizona Employers' Liability Cases*, 250 U. S. 400, 421; *Van Dyke* v. *Wood*, 60 App. Div. 208, 212; *78th Street & Broadway Co.* v. *Rosenbaum*, 111 Misc. (N. Y.) 577; *American Coal Mining Co.* v. *Special Coal & Food Comm.*, 268 Fed. Rep. 563. American courts are constantly studying English history and English statutes in order to determine whether a particular exercise of legislative power is or

is not within the principle of due process of law, or is or is not arbitrary and unduly oppressive. Numerous and familiar instances will readily recur to the court. See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276. In giving the preference to the tenant in possession, the legislature merely legalized a long-standing social custom and restraint evidenced in the English, Irish, Scotch, Hebrew, Maryland and New York precedents, and thereby was enabled to protect its present residents in their homes from competition by nonresidents.

The classification made in the statutes is justified by the character and extent of the evil aimed at, and obvious differences in subject-matter.

Chapter 944 is not invalid because it does not specifically define what shall constitute an unreasonable rent and an oppressive agreement therefor; nor are its other provisions unfair or unreasonable.

Mr. Louis Marshall and *Mr. Lewis M. Isaacs*, by leave of court, filed a brief as *amici curiæ:*

It is safe to say that never before in the history of our country has legislation of so revolutionary a character been undertaken. Private property, devoted to purposes essentially private, is sought to be taken out of the control of the owner and to be placed in the possession and occupancy of another on terms, not in accordance with the contract between them, but such as a court or jury may fix. The legislature takes the property of A and gives it to B for an indefinite period on terms which A is unwilling to accept but which he is to be forced to accept *nolens volens*. If the tenant refuses to pay the stipulated rent, or if he holds over after the expiration of his term, the landlord cannot regain possession, because, by these acts, he has been stripped of the right to maintain a possessory action. Should he sue to recover the rent stipulated by the contract, he is met by

the defense that the terms of the contract are unjust and unreasonable, and if the amount of the stipulated rent is greater than the rent paid for the use of the premises a year prior to the date of the agreement under which the rent is sought to be recovered, he is confronted by a statutory presumption that the rent sought to be recovered is unjust and oppressive. The burden of overcoming this presumption is imposed on him. In spite of the fact that there has been an express agreement, in contravention of the well-established rule that a contract will not be implied where the parties have entered into an express contract, he has the option of either going empty out of court, should he in the opinion of an interested jury be unable to overcome this presumption, or of being left to recover for use and occupation on a *quantum meruit* in lieu of the stipulated rent. He is compelled either to submit to the determination of the tenant or to incur the expense, the vicissitudes and the delay of litigation in an effort to enforce his contract.

The statute prescribes no standards by which the justice and reasonableness and freedom from oppression which must be established in order to warrant a recovery under the laws, are to be determined.

That such standards are necessary in order that there may be due process of law is illustrated by the decisions in *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Collins* v. *Kentucky*, 234 U. S. 634, and *American Seeding Machine Co.* v. *Kentucky*, 236 U. S. 660. See also *United States* v. *Cohen Grocery Co.*, 255 U. S. 81.

In the provision relating to a bill of particulars the essential elements entering into the ascertainment of rental value are omitted.

The legislature by these acts leaves the determination of the complicated question of rental value at a time when all prices and values of the necessaries of life have risen, with the consequent and universal irritation re-

sulting therefrom, to a court or jury with respect to each case as it may arise, without providing guide or compass or defining a standard enforceable by the owner of the property as well as by the tenant. If it should appear that the agreed rental is less than it could be proven that it legitimately might have been, the tenant can only be required to pay the stipulated rental. If during the term of the lease the prevailing rental value of the property should be enhanced, the tenant could not be required to pay more than he agreed to pay. The fact that the lease runs for a term of years and that the vicissitudes incidental to our economic life may bring about a change of conditions and of values, are necessary elements in price or rental value. Yet, under this statute, the landlord is to bear all risks and the tenant is to be enabled at will to assert the obligation of the landlord's covenant or to deny the validity of his own.

The provision that a mere increase in the rent of demised premises over the rent as it existed one year prior to the agreement under which it is sought to be recovered, renders the contract presumptively unjust, unreasonable and oppressive, is arbitrary and unreasonable and offends against the due process clause.

The practical effect of such a provision necessarily would be to invalidate a lease which provided for an increased rental unless the landlord could, on a trial before a jury, overcome this presumption by proving a negative, namely, that the agreement was not unjust, unreasonable and oppressive. That would necessitate proof in justification of the terms of the contract, the giving of testimony as to what would be a fair return upon the property which was the subject of the lease. This in turn would give rise to proof as to a multitude of elements affecting the reasonableness of the rent. It might involve an issue as to each element of value. It might call for the giving of expert testimony by both sides; and the burden of

proof would rest on the landlord. And yet the court in a case involving the regulation of rates of a common carrier, (*New York Central R. R. Co.* v. *Public Service Commission*, 215 N. Y. 241,) declared that the burden of proof that an increase of rates was reasonable could not be cast on the railroad company, even where the rates are to be fixed by an impartial commission.

If the legislature may say to the owner of a building devoted to private purposes, that he shall not be permitted to enter into a contract for the leasing of his property except on condition that the contract shall run the gauntlet of the courts and juries and that the amount that he shall be permitted to charge shall eventually be fixed by a court or jury, then it is difficult to understand why the legislature may not say to the farmer or to the grocer that, irrespective of the contract price at which he may sell to a customer milk, potatoes, wheat, or any other of his products, the purchaser may contest the reasonableness of the price and be limited in his payment to the sum that a court or jury may eventually determine to be the just and reasonable price. There is not a business conceivable, however private it may be, that could not with equal right be made dependent upon the action of the legislature.

This statute deprives the landlord of his liberty of contract and of his property without due process of law.

What is true of the taking of property is equally true of the enjoyment of the incidents and attributes of property. In the case of real property, the rents, income and profits derivable from its holding are such attributes.

Liberty, it has been frequently held, includes the right to acquire property, and that means the right to make and enforce contracts in respect thereof.

There can be no doubt that the police power has long existed and that in recent years its scope has been somewhat extended. Nevertheless it is not superior, but sub-

ject to the Constitution. This should not for a moment be forgotten, if free government under our present system is to continue. *Matter of Jacobs*, 98 N. Y. 98, 108; *Slaughter-House Cases*, 16 Wall. 36, 87; *Adair* v. *United States*, 208 U. S. 161; *People* v. *Marcus*, 185 N. Y. 257; *Coppage* v. *Kansas*, 236 U. S. 1.

We are met with the contention that the State has the right to fix the charges to be made by the owner of private property for its use, on the theory that the public welfare may be thereby promoted.

The plaintiff's property was not devoted to any public use. The various apartments constituted dwellings that were rented for private occupation to the several persons whom the owner was willing to accept as tenants. The general public had no concern with this property.

Innkeepers have from the earliest days been recognized as engaged in a public business. On the other hand, a boarding-house keeper is engaged in a private business; is, therefore, under no obligation to serve the public; is at liberty to choose his own guests, and to make special arrangements with them. Except so far as regulations relating to health and morals are concerned, he does not come within the regulatory power of the legislature.

Grist mills, also, are devoted to a public purpose. Their owners have enjoyed valuable privileges from the legislatures with respect to the erection of dams and the flowage of land.

So of the owners of bridges, ferries, and public grain elevators and warehouses, electric light plants, oil pipe lines, and other similar public utilities. The distinction between them and the owners of private property designed for private uses has been uniformly observed.

In *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, the business sought to be regulated was that of fire insurance. That was shown to be a business that had been regulated for many years in all parts of the

country, carried on exclusively by corporations which derived their existence from the sovereign. Theirs was conceded to be a business affecting the public welfare.

There is nothing in *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, that will support this legislation. There was not even an intimation that the corporation commission was constitutionally empowered to establish rates for laundry work. The court decided that the plaintiff was entitled to a temporary injunction restraining the enforcement of the penalties prescribed by the statute, which in effect prevented judicial review.

This court has just declared the Lever Act unconstitutional. The decision rendered is the more noteworthy because it was enacted by Congress in the exercise of the war powers conferred by the Federal Constitution. No such powers are conferred on the New York legislature.

In *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 256, it was held that, as to that portion of the business of the corporation which consisted mainly in furnishing automobiles from its central garage on orders by telephone, the regulation was not authorized.

In *Clark* v. *Nash*, 198 U. S. 361, there was no pretense that property could be taken without compensation. The sole question was as to whether the proposed taking came within the power of eminent domain. So of *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527.

Schmidinger v. *Chicago*, 226 U. S. 578, merely involved the question whether an ordinance, enacted under express legislative authority, fixing standard sizes of bread loaves, was valid. That was regarded merely as an exercise of the police power intended to prevent deceit, and practically of the same character as that of fixing weights and measures. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, which related to a special tax on trading stamps,

proceeded on the theory that their use was akin to lotteries and gaming.

The limitation of the power of the legislature to regulate the compensation of employment agencies was fully considered in *Adams* v. *Tanner*, 244 U. S. 590. See *Stell* v. *Mayor*, 95 N. J. L. 38, concerning directly the rights of landlords.

Collister v. *Hayman*, 183 N. Y. 250; *Burnham* v. *Flynn*, 189 N. Y. 180, *Woollcott* v. *Shubert*, 217 N. Y. 212, and *People* v. *Newman*, 109 Misc. (N. Y.) 622, held that a theatre is not governed by the rules which relate to public utilities and that the owners cannot be controlled as to their rates, nor be compelled to admit the public generally, nor be prevented from arbitrarily excluding any person whom they may see fit to exclude.

Many other cases might be cited as illustrating the proposition that statutes undertaking to fix the prices to be charged by private persons for services rendered or property sold cannot be sustained. *Brazee* v. *Michigan*, 241 U. S. 340; *Adams* v. *Tanner*, 244 U. S. 590; *Holter Hardware Co.* v. *Boyle*, 263 Fed. Rep. 134; *Fisher Co.* v. *Woods*, 187 N. Y. 90; *Ex parte Dickey*, 144 California, 234; *State* v. *Fire Creek Coal Co.*, 33 W. Va. 188.

Some of our opponents have indulged at some length in citations from historians, decisions and statutes dealing with conditions in European countries, as, e. g., in Ireland and Scotland. They have also referred to alleged *responsa* of rabbis rendered in mediæval times, in their capacity as arbitrators. These passages from the history of other countries, whose organic law differs fundamentally from ours, have no application here, where our legislation is necessarily governed by our written constitutions. Nor are *responsa* rendered in the exercise of an ecclesiastical as distinguished from a judicial function by rabbis, who were intent upon the avoidance of conflict among members of the synagogue, of the slightest moment. The

very fact that the Jews, in the days when these arbitraments took place, could not own real property of itself indicates how far afield these alleged precedents are apt to lead one.

Nothing is clearer under our jurisprudence than that the legislature cannot carve out of existing estates, new estates, *in invitum*. It cannot confer on a tenant an equitable lien or charge against the owner's title, to take effect on the expiration of the tenancy. That would be confiscation, pure and simple. It would create the astounding doctrine, once a tenant, forever a tenant. What becomes of vested rights under such a theory? What becomes of property? The theory of a "tenant right" such as that sought to be imported into our land tenures by means of legislation has never gained a foothold here, and is foreign to our institutions as it is opposed to our constitutions. *Ives* v. *South Buffalo Ry. Co.*, 201 N. Y. 271, 287.

Assuming, but not conceding, that the taking of private property for housing purposes may be permitted for a public purpose, it can only be done upon making just compensation and in the manner provided by the Constitution.

The statute denies to the plaintiff the equal protection of the laws. There was no reasonable ground for excluding hotels, lodging houses, new buildings and buildings used for commercial, manufacturing or other business purposes; or for not extending the regulations to cities other than those included when like conditions were conceded to exist.

The act impairs the obligations of another contract. Prior to its passage the plaintiff and prospective tenants had entered into a lease at a fixed rental for a term of two years beginning October 1st, 1920. On September 27, 1920, the legislature declared this lease presumptively unjust, unreasonable and oppressive because it increased

the rent previously received by the plaintiff for these premises, and permitted the lessees to interpose this claim as a defense to any action that might be brought for the rent stipulated in the lease.

That this tends to nullify the contract between the parties and permits a court or jury to create a different contract from that which the parties agreed upon is self-evident.

The fact that the act under review recites that it is based on the existence of a public emergency does not validate it, if its provisions are violative of the Constitution.

Not only do the statements contained in the report of the Legislative Committee and in the message of the Governor, relied upon in support of this legislation, fail to justify it, but in most material respects they are contrary to the facts, and the theories therein propounded if pursued would inevitably aggravate the dearth of housing accommodations to which attention is directed.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the Marcus Brown Holding Company, the appellant, owner of a large apartment house in the City of New York, against the tenants of an apartment in the house and the District Attorney of the County of New York. The tenants are holding over after their lease has expired, which it did on September 30, 1920, claiming the right to do so under cc. 942 and 947 of the laws of New York of 1920. The object of the bill is to have these and other connected laws declared unconstitutional. The District Attorney is joined in order to prevent his enforcing by criminal proceedings cc. 131 and 951 of the acts of the same year, which make it a misdemeanor for the lessor or any agent

or janitor intentionally to fail to furnish such water, heat, light, elevator, telephone, or other service as may be required by the terms of the lease and necessary to the proper or customary use of the building. The case was heard in the District Court by three judges upon the bill, answer, affidavits and some public documents, all of which may be summed up in a few words. The bill alleges at length the rights given to a lessor by the common law and statutes of New York before the enactment of the statutes relied upon by the tenants, a covenant by the latter to surrender possession at the termination of their lease, and due demand, and claims protection under Article I, § 10 and the Fourteenth Amendment of the Constitution of the United States. An affidavit alleges that before the passage of the new statutes another lease of the premises had been made, to go into effect on October 1, 1920. The answer of the tenants relies upon the new statutes and alleges a willingness to pay a reasonable rent and any reasonable increase as the same may be determined by a court of competent jurisdiction. It also alleges that they made efforts to obtain another suitable apartment but failed. The District Attorney moved to dismiss the bill. The judges considered the case upon the merits, upheld the laws and ordered the bill to be dismissed.

By the above mentioned cc. 942 and 947, a public emergency is declared to exist and it is provided by c. 947 that no action "shall be maintainable to recover possession of real property in a city of a population of one million or more or in a city in a county adjoining such city, occupied for dwelling purposes, except an action to recover such possession upon the ground that the person is holding over and is objectionable, . . . or an action where the owner of record of the building, being a natural person, seeks in good faith to recover possession of the same or a room or rooms therein for the im-

mediate and personal occupancy by himself and his family as a dwelling; or an action to recover premises for the purpose of demolishing the same with the intention of constructing a new building. . . ." The earlier c. 942 is similar with some further details. Both acts are to be in effect only until November 1, 1922. It is unnecessary to state the provisions of c. 944 for disputes as to what is a reasonable rent. They are dealt with in the decisions of the Court of Appeals cited below and in *Edgar A. Levy Leasing Co., Inc.* v. *Siegel*, 230 N. Y. 634, by the same Court. In this as in the previous case of *Block* v. *Hirsh*, *ante*, 135, we shall assume in accordance with the statutes, the finding of the Court below and of the Court of Appeals of the State, in *People ex rel. Durham Realty Corporation* v. *La Fetra*, 230 N. Y. 429, and *Guttag* v. *Shatzkin*, 230 N. Y. 647, that the emergency declared exists. *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303. *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 607.

The chief objections to these acts have been dealt with in *Block* v. *Hirsh*. In the present case more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession and of the new lease which was to have gone into effect upon October 1, last year. But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be. *Manigault* v. *Springs*, 199 U. S. 473, 480. *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 482. *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67, 76, 77. *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372, 375. *Producers Transportation Co.* v. *Railroad Commission of California*, 251 U. S. 228, 232. It is said too that the laws are discriminating, in respect of the cities affected and the character of the buildings, the laws not extending to buildings occupied for business purposes, hotel property or buildings now in course of erection, &c.

170. McKENNA, J., WHITE, Ch. J., and others, dissenting.

But as the evil to be met was a very pressing want of shelter in certain crowded centers the classification was too obviously justified to need explanation, beyond repeating what was said below as to new buildings, that the unknown cost of completing them and the need to encourage such structures sufficiently explain the last item on the excepted list.

It is objected finally that c. 951, above stated, in so far as it required active services to be rendered to the tenants, is void on the rather singular ground that it infringes the Thirteenth Amendment. It is true that the traditions of our law are opposed to compelling a man to perform strictly personal services against his will even when he has contracted to render them. But the services in question although involving some activities are so far from personal that they constitute the universal and necessary incidents of modern apartment houses. They are analogous to the services that in the old law might issue out of or be attached to land. We perceive no additional difficulties in this statute, if applicable as assumed. The whole case was well discussed below and we are of opinion that the decree should be affirmed.

Decree affirmed.

MR. JUSTICE McKENNA, THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE McREYNOLDS, dissenting:

This case was submitted with *Block* v. *Hirsh*, No. 640, *ante*, 135.

Like that case it involves the right of a lessee of property—in this case an apartment in an apartment house in New York City—to retain possession of it under a law of New York after the expiration of the lease. This case is an emphasis of the other, and the argument in that applies to this. It may be more directly applica-

ble; for in this case the police power of the State is the especial invocation and the court's judgment is a concession to it, and, as we understand the opinion, in broader and less hesitating declaration of the extent and potency of that power. "More emphasis," it is said, "is laid upon the impairment of the obligation of the contract" than in the *Hirsh Case*. In measurement of this as a reliance, it is said, "But contracts are made subject to this exercise of the power of the State *when otherwise justified, as we have held this to be.*" The italics are ours and we estimate them by the cases that are cited in their explanation and support. We are not disposed to a review of the cases. We leave them in reference, as the opinion does, with the comment that our deduction from them is not that of the opinion. There is not a line in any of them that declares that the explicit and definite covenants of private individuals engaged in a private and personal matter are subject to impairment by a state law, and we submit, as we argued in the *Hirsh Case*, that if the State have such power—if its power is superior to Article I, § 10, and the Fourteenth Amendment, it is superior to every other limitation upon every power expressed in the Constitution of the United States, commits rights of property to a State's unrestrained conceptions of its interests, and any question of them—remedy against them—is left in such obscurity as to be a denial of both. There is a concession of limitation but no definition of it, and the reasoning of the opinion, as we understand it, and its implications and its incident, establish practically unlimited power.

We are not disposed to enlarge further upon the case or attempt to reconcile the explicit declaration of the Constitution against the power of the State to impair the obligations of a contract or, under any pretense, to disregard the declaration. It is safer, saner, and more consonant with constitutional preëminence and its pur-

poses to regard the declaration of the Constitution as paramount, and not to weaken it by refined dialectics, or bend it to some impulse or emergency "because of some accident of immediate overwhelming interest which appeals to the feeling, and distorts the judgment." *Northern Securities Co.* v. *United States*, 193 U. S. 197, 400.

We therefore dissent.